No. 89-645

In the Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL MILKOVICH, SR.,
Petitioner,

vs.

THE LORAIN JOURNAL CO., ET AL.,
Respondents.

On Writ Of Certiorari To The Ohio Court Of Appeals
For The Eleventh Appellate District
(Lake County, Ohio)

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 5, 1989
CERTIORARI GRANTED JANUARY 22, 1990

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CHRONOLOGICAL LISTING OF RELEVANT DOCKET ENTRIES

Plaintiff		*Defendants*
Michael Milkovich, Sr.	v.	**Lorain Journal Company, The News-Herald,** and **J. Theodore Diadiun.***

Milkovich I	Date	Description
A. Lake County Court of Common Pleas (Case No. 75 CIV 0301)	04/30/75	Original Complaint with Jury Demand filed in Court of Common Pleas of Lake County, Ohio.
	05/27/75	Defendants' Original Answer filed.
	06/03/75	Defendants' Amended Answer filed.
	10/02/75	Plaintiff's Amended Complaint filed.
	10/03/75	Defendants' Second Amended Answer filed.
	11/08/75	Defendants' first Motion for Summary Judgment and Brief in Support with various evidentiary documents filed.
	12/22/75	Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment and four deposition transcripts filed.
	01/21/77	Defendants' Reply Brief in support of Motion for Summary Judgment filed.
	05/23/77	Court of Common Pleas of Lake County, Ohio grants partial Summary Judgment to Defendants on issue of whether Plaintiff is a public figure.
	04/13/78	Trial commences.
	05/01/78	Court of Common Pleas of Lake County, Ohio grants Defendants' Motion for a Directed Verdict.

*The parties are designated here as they originally appeared in the case and not as Appellant or Appellee or as Petitioner or Respondent.

Milkovich I	Date	Description
	05/18/78	Plaintiff files Notice of Appeal to Ohio Court of Appeals, Eleventh Appellate District (Lake County, Ohio).
B. Ohio Court of Appeals for Eleventh Appellate District (Lake County, Ohio; Case No. 6-287)	11/27/78	Plaintiff files record on appeal.
	02/12/79	Plaintiff's Brief on the Merits filed.
	03/21/79	Defendants' Answer Brief filed.
	12/03/79	Court of Appeals issues Journal Entry and Opinion reversing and remanding case for new trial with dissenting opinion.
	12/27/79	Defendants file Notice of Appeal to Supreme Court of Ohio.
C. Supreme Court of Ohio (Case No. 80-107)	01/25/80	Defendants file a copy of Notice of Appeal and their Memorandum in Support of Jurisdiction in the Supreme Court of Ohio.
	03/05/80	Plaintiff's Memorandum Opposing Jurisdiction in the Supreme Court of Ohio is filed.
	03/10/80	Defendants file Reply Memorandum in Supreme Court of Ohio.
	03/20/80	Supreme Court of Ohio issues Order denying Motion to Certify Record and dismissing appeal.
	03/31/80	Defendants file Motion for Rehearing.
	04/25/80	Supreme Court of Ohio denies Motion for Rehearing.
D. United States Supreme Court (Case No. 80-100)	07/23/80	Defendants file Petition for Writ of United States Certiorari to the Ohio Supreme Court With the United States Supreme Court.
	09/04/80	Plaintiff files Brief opposing jurisdiction.
	11/03/80	United States Supreme Court denies Defendants' Petition for a Writ of Certiorari.

Milkovich II	Date	Description
A. Lake County Court of Common Please (Case No. 75 CIV 0301)	04/16/81	Defendants file second Motion for Summary Judgment in Court of Common Pleas, Lake County, Ohio, (Judge Jackson), claiming that the article "constitutes a mere expression of the author's opinion."
	05/01/81	Plaintiff files Brief in Opposition to Defendants' Motion for Summary Judgment.
	05/26/81	Court holds hearing on Motion for Summary Judgment.
	07/14/81	Defendants file Supplemental Brief in Support of Summary Judgment.
	09/04/81	Court of Common Pleas of Lake County, Ohio issues Opinion and Journal Entry granting Defendants' second Motion for Summary Judgment.
	10/26/81	Plaintiff files Notice of Appeal to the Ohio Court of Appeals, Eleventh Appellate District Lake County, Ohio.
B. Ohio Court of Appeals for Eleventh District (Lake County, Ohio; Case No. CA-9-012)	01/04/82	Plaintiff transmits record to Court of Ohio Court of Appeals
	03/22/82	Plaintiff files Brief on the Merits.
	06/01/82	Defendants file Answer Brief.
	10/03/83	Journal Entry and Opinion affirming Judgment of the Court of Common Pleas of Lake County, Ohio are issued by Court of Appeals.
	10/31/83	Plaintiff files Notice of Appeal to the Supreme Court of Ohio.
C. Supreme Court of Ohio (Case No. 83-1833)	11/30/83	Plaintiff files copy of Notice of Appeal Supreme Court in Supreme Court of Ohio.
	12/07/83	Plaintiff files Memorandum in Support of Jurisdiction in the Supreme Court of Ohio.

Milkovich II	Date	Description
	01/06/84	Defendants file Memorandum in Opposition to Jurisdiction.
	02/01/84	Supreme Court of Ohio issues Order to certify the record and dockets cause on the merits.
	06/27/84	Plaintiff transmits Record to the Supreme Court of Ohio.
	07/19/84	Plaintiff's Brief in Supreme Court of Ohio filed.
	08/27/84	Defendants' Brief in Supreme Court of Ohio filed.
	10/02/84	Plaintiff's Reply Brief in Supreme Court of Ohio filed.
	12/31/84	Supreme Court of Ohio issues Opinion and Journal Entry reversing and remanding for trial.
	01/09/85	Defendants file Motion for Rehearing.
	01/15/85	Plaintiff's Memorandum in Opposition to Motion for Rehearing filed.
	02/06/85	Motion for Rehearing is denied by Supreme Court of Ohio.
D. United States Supreme Court (Case No. 84-1731)	05/06/85	Defendants file second Petition for Writ of Certiorari to the Supreme Court Supreme Court of Ohio in the United States Supreme Court.
	07/10/85	Plaintiff's Brief in opposition to Petition for Writ of Certiorari filed.
	11/04/85	U.S. Supreme Court denies petition for Writ of Certiorari, Justices Brennan and Marshall, dissenting.

Milkovich III	Date	Description
A. Lake County Court of Common Please (Case No. 75 CIV 0301)	01/16/87	Defendants file third Motion for Summary Judgment in the Court of Common Pleas, Lake County, Ohio (Judge Jackson).
	07/14/87	Plaintiff files Memorandum in Opposition to Summary Judgment.
	08/07/87	Defendants file Reply Brief in support of summary judgment.
	10/06/87	Court of Common Pleas of Lake County, Ohio grants Motion for Summary Judgment.
B. Ohio Court of Appeals for Eleventh District (Lake County Ohio; Case No. 13-009)	10/29/87	Plaintiff files Notice of Appeal to Ohio Court of Appeals for the Eleventh Appellate District.
	03/24/88	Plaintiff's Brief on Merits filed in Ohio Court Court of Appeals.
	05/02/88	Defendants' Answer Brief filed.
	02/06/89	Court of Appeals issues Journal Entry and Opinion affirming summary judgment.
	03/01/89	Plaintiff files Notice of Appeal to Supreme Court of Ohio.
C. Supreme Court of Ohio (Case No. 89-541)	03/30/89	Plaintiff files copy of Notice of Supreme Appeal in the Supreme Court of Ohio.
	04/10/89	Plaintiff files Memorandum in Support of Jurisdiction in the Supreme Court of Ohio filed.
	05/09/89	Defendants' Memorandum in Opposition to Jurisdiction filed.
	06/07/89	Supreme Court of Ohio denies Plaintiff's Motion to Certify and dismisses appeal sua sponte for want of a substantial constitutional question.

Milkovich III	Date	Description
D. United States Supreme Court (Case No. 89-645)	09/05/89	Plaintiff files Petition for Writ of Certiorari to the Ohio Court of Appeals for the Eleventh Appellate District with the United States Supreme Court.
	11/22/89	Defendants file Brief in opposition to Petition for a Writ of Certiorari.
	01/22/90	United States Supreme Court grants Plaintiff's Petition for a Writ of Certiorari.

Plaintiff's First Amended Complaint
(October 2, 1975)

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH 15600 Rockside Road Maple Heights, Ohio *Plaintiff.*	)	CASE NO. 75 CIV 0301
-vs-	)	**AMENDED COMPLAINT WITH JURY DEMAND**
THE NEWS-HERALD 38879 Mentor Avenue Willoughby, Ohio 44094	)	
THE LORAIN JOURNAL CO. c/o Statutory Agent James L. Lonergan 1657 Broadway Avenue Lorain, Ohio 44052 *Defendants.*	)	
I. THEODORE DIADIUN, a.k.a. TED DIADIUN 5899 Reynolds Mentor-on-the-Lake, Ohio *New-Party Defendant.*	)	

Now comes the plaintiff, MICHAEL MILKOVICH, SR., and for his Complaint against the defendants, THE NEWS-HERALD, THE LORAIN JOURNAL CO., and I. THEODORE DIADIUN, a.k.a. TED DIADIUN, alleges and sets forth the following:

1. Plaintiff is, and at all times mentioned herein, was a faculty member of Maple Heights High School, an employee of the Maple Heights Board of Education, and the Varsity Wrestling Coach of the Maple Heights High School Wrestling Team, and performed all of said functions primarily in the City of Maple Heights, County of Cuyahoga, and State of Ohio.

2. The defendant, THE NEWS-HERALD, is and at all times mentioned herein was a newspaper published in the City of Willoughby, County of Lake, and State of Ohio, and distributed as a daily newspaper in Lake County, Ohio, and parts of Cuyahoga County, Ohio.

3. The defendant, THE LORAIN JOURNAL CO., is and at all times mentioned herein was a corporation existing under the laws of the State of Ohio, and was engaged in the business of publishing a daily newspaper under the name of "The News-Herald."

4. The exact relationship between defendant, THE NEWS-HERALD, and, defendant, THE LORAIN JOURNAL CO., is not at the present time known to this plaintiff.

5. The defendant, I. THEODORE DIADIUN, a.k.a., TED DIADIUN, was at all times mentioned herein a newspaper sports writer, and writer of numerous sports articles published by the Lorain Journal Co. in the News-Herald.

6. On or about the 8th day of January, 1975, the defendant, THE LORAIN JOURNAL CO., caused to be published in the News-Herald the following matter concerning plaintiff, written by defendant, I. THEODORE DIADIUN, a.k.a. TED DIADIUN, News-Herald Sports Writer:

> "MAPLE BEAT THE LAW WITH THE 'BIG LIE'."
>
> "... a lesson was learned (or relearned yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.
>
> A lesson which, sadly, in view of the events of the past years, is well they learned early.
>
> It is simply this: If you get in a jam, lie your way out.

If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools, H. Donald Scott...

Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

But they got away with it.

Is this the kind of lesson we want our young people learning from their high school administrators and coaches?

I think not."

A complete copy of said article is attached hereto, incorporated herein, and identified as "Exhibit A."

7. The matter so published concerning plaintiff directly, accused plaintiff of committing the crime of perjury, an indictable offense in the State of Ohio, and damaged plaintiff directly in his lifetime occupation of coach and teacher, and constituted libel per se.

8. That in publishing said material, defendants jointly and severally acted in a malicious and willful manner, with specific intent to injure plaintiff, or acted in a malicious fashion by publishing said libelous matter with reckless disregard for the truth or falsity of the statements so published.

9. The matter so published concerning the plaintiff is false and defamatory.

10. By reason of said publication, plaintiff was injured in his reputation and suffered great pain and mental anguish to his damage in the sum of TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000.00).

WHEREFORE, plaintiff demands judgment against the defendants, THE NEWS-HERALD, THE LORAIN JOURNAL CO., and I THEODORE DIADIUN, a.k.a. TED DIADIUN, jointly and severally for compensatory damages in the amount of TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000.00), and further, plaintiff demands judgment against the defendants, jointly and severally, for exemplary and punitive damages in the amount of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00), attorneys fees for prosecuting the within action, for interest and for the costs of this action.

MANDANICI, DOMIANO, EASA, NUCCIO & SIMON
Attorneys for Plaintiff
1328 Standard Building
Cleveland, Ohio 44113
771-4500

Of Counsel:

Nathan Simon /s/
NATHAN SIMON

Michael J. Occhionero /s/
MICHAEL J. OCCHIONERO

JURY DEMAND

Pursuant to Rule 38(B) of the Ohio Rules of Civil Procedure, plaintiff demands jury of Eight (8) to try the issues of fact arising in the within cause.

MANDANICI, DOMIANO, EASA, NUCCIO & SIMON
Attorneys for Plaintiff
1328 Standard Building
Cleveland, Ohio 44113
771-4500

Of Counsel:

Nathan Simon /s/
NATHAN SIMON

Michael J. Occhionero /s/
MICHAEL J. OCCHIONERO

SERVICE

Service was had by mailing a copy of the foregoing Amended Complaint to Messrs. David L. Herzer and William G. Wickens, at 763 Broadway, 212 Ohio Edison Building, Lorain, Ohio 44052, and to Mr. John J. Hurley, Jr., at 66 Mentor Avenue, Painesville, Ohio 44077, Attorneys for Defendants, The News-Herald and The Lorain Journal Co., this 3rd day of October, 1975.

MANDANICI, DOMIANO, EASA, NUCCIO & SIMON
Attorneys for Plaintiff
1328 Standard Building
Cleveland, Ohio 44113
771-4500

Of Counsel:

Nathan Simon /s/
NATHAN SIMON

Michael J. Occhionero /s/
MICHAEL J. OCCHIONERO

Maple beat the law with the 'big lie'

TD Says

By TED DIADRUN
News-Herald Sports Writer

Yesterday in the Franklin County Common Pleas Court, Judge Paul Martin overturned an Ohio High School Athletic Assn. decision to suspend the Maple Heights wrestling team from this year's state tournament.

It's not final yet — the judge granted Maple only a temporary injunction against the ruling — but unless the judge acts much more quickly than he did in this decision (he has been deliberating since a Nov. 1 hearing) the temporary injunction will allow Maple to compete in the tournament and make any further discussion meaningless.

But there is something much more important involved here than whether Maple was denied due process by the OHSAA, the basis of the temporary injunction.

When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator.

There is scarcely a person concerned with school who doesn't have his mark in some way on the young people who pass his way — many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experience with and observation of their superiors and peers, from watching actions and reactions.

Such a h..on was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

Please turn to page 20

... Diadiun says Maple told a lie

(Continued from Page 38)

A lesson which, sadly, in view of the events of the past year, is well they learned early.

It is simply this: If you get in a jam, lie your way out.

If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

The teachers responsible were mainly head Maple wrestling coach Mike Milkovich and former superintendent of schools H. Donald Scott.

Last winter they were faced with a difficult situation. Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with Greater Cleveland Conference rival Mentor, and resulted in first the Maple Heights team, then many of the partisan crowd attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital.

Naturally, when Mentor protested to the governing body of high school sports, the OHSAA, the two men were called on the carpet to account for the incident.

But they declined to walk into the hearing and face up to their responsibilities, as one would hope a coach of Milkovich's accomplishments and reputation would do, and one would certainly expect from a man with the responsible poisition of superintendant of schools.

Instead they chose to come to the hearing and misrepresent the things that happened to the OHSAA Board of Control, attempting not only to convince the board of their own innocence, but, incredibly, shift the blame of the affair to Mentor.

I was among the 2,000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing before the OHSAA, so I was in a unique position of being the only non-involved party to observe both the meet itself and the Milkovich-Scott version presented to the board.

Any resemblance between the two occurances is purely coincidental.

To anyone who was at the meet, it need only be said that the Maple coach's wild gestures during the events leading up to the brawl were passed off by the two as "shrugs," and that Milkovich claimed he was "Powerless to control the crowd" before the melee.

Fortunately, it seemed at the time, the Milkovich-Scott version of the incident presented to the board of control had enough contradictions and obvious untruths so that the six board members were able to see through it.

Probably as much in distasteful reaction to the chicanery of the two officials as in displeasure over the actual incident, the board then voted to suspend Maple from this year's tournament and to put Maple Heights, and both Milkovich and his son, Mike Jr. (the Maple Jaycee coach), on two-year probation.

But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them.

"I can say that some of the stories told to the judge sounded pretty darned unfamiliar," said Dr. Harold Meyer, commissioner of the OHSAA, who attended the hearing. "It certainly sounded different from what they told us."

Nevertheless, the judge bought their story, and ruled in their favor.

Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

But they got away with it.

Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

I think not.

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Defendants' Second Amended Answer
(October 3, 1975)

IN THE COURT OF COMMON PLEAS
STATE OF OHIO
SS:
COUNTY OF LAKE

MICHAEL MILKOVICH, SR., *Plaintiff,*	)	CASE NO. 75 CIV 0301
-vs-	)	
THE NEWS-HERALD,	)	
THE LORAIN JOURNAL COMPANY, and	)	SECOND AMENDED ANSWER
I. THEODORE DIADIUN, aka TED DIADIUN *Defendants.*	)	

Now come the Lorain Journal Company, Defendant, owner and publisher of The News-Herald, for itself and The News- Herald, and I. Theodore Diadiun, aka Ted Diadiun, Defendant, and make the following as their Second Amended Answer:

FIRST DEFENSE

1. Defendants admit the allegations of Paragraphs 1, 2 and 3 of Plaintiff's Complaint.

2. Defendants admit that Paragraph 5 of Plaintiff's Complaint contains excerpts from Defendants' publication in The News-Herald issue of January 8, 1975, as written by its Sports Writer, Ted Diadiun.

3. Defendants deny the allegations of Paragraphs 6, 7, 8 and 9 of Plaintiff's Complaint.

SECOND DEFENSE

Defendants say that said publication was made without malice and without knowledge of its falsity and without reckless disregard of the truth.

THIRD DEFENSE

Defendants say that the Plaintiff is a public figure and public official and that his conduct, activity and behavior as one of the nation's outstanding wrestling coaches is of great public interest and concern. Defendants say that said publication was made without malice and without knowledge of its falsity and without reckless disregard of the truth, and is privileged under the Constitution of the United States.

FOURTH DEFENSE

Defendants deny that the publication which was the subject of this action was negligently made.

FIFTH DEFENSE

Defendants deny that the publication which was the subject of this action caused actual injury to the Plaintiff in his standing in the community.

SIXTH DEFENSE

Defendants say that the publication which is the subject of this action was true.

WHEREFORE, Defendants pray that Plaintiff's Complaint be dismissed and that they may go hence with their costs.

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(By William G. Wickens)	WICKENS & HERZER
66 Mentor Avenue	763 Broadway
Painesville, Ohio 44077	Lorain, Ohio 44052
Telephone: (216) 357-5558	Telephone: (216) 244-5268

*Attorneys for Defendants**

*Certificate of service omitted.

Relevant Orders, Judgment Entries, and Opinions of All Lower Courts in Chronological Order Including Judgment Entry Appealed From

Judgment Entry of the Court of Common Pleas of Lake County, Ohio Granting Defendants' Motion for a Directed Verdict (May 1, 1978)

Court adjourned to Monday 5/1/1978, Court not pursuant to adjournment. Present and presiding, JOHN F CLAIR, JR., *Judge*, JOHN M. PARKS, *Judge*, ROSS D. AVELLONE, *Judge*.

Case No. 75 Civ 0301

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR.,
Plaintiff,

vs.

THE NEWS-HERALD, *et al.*,
Defendants.

JOURNAL ENTRY

The Court, coming on to consider the Motion of the Defendants for a directed verdict in favor of the Defendants, which Motion was made at the close of the Plaintiff's evidence in the fifth day of trial, and upon consideration of the arguments of counsel, the Court finds that the Motion is well taken and that the said Motion should be and hereby is granted.

The Court finds that reasonable minds can come but to one conclusion, to-wit: that the evidence (construed

most strongly in favor of the Plaintiff) fails to establish by clear and convincing proof that the article which was the subject of this action was published with knowledge of its falsity or in reckless disregard of the truth, and that there is no justiciable issue for the jury. Exceptions to the Plaintiff.

/s/ JOHN F. CLAIR, J.
Judge

Judgment Entry of the Ohio Court of Appeals for the Eleventh Appellate District, Lake County, Ohio
(December 3, 1979)

Case No. 6-287

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

MICHAEL MILKOVICH,
Appellant,

vs

THE LORAIN JOURNAL COMPANY, *et al.*,
Appellees.

JUDGMENT ENTRY

This cause came on to be heard upon the record in the Trial Court, and was briefed and argued by counsel for the parties.

Upon consideration whereof, this Court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and the judgment of the Trial Court is reversed. Each Assignment of Error was reviewed by the Court and disposed of as set forth in this Court's Opinion which is incorporated hereby by reference.

No other error appearing in the record, judgment reversed and cause remanded for further proceedings. Cook, J., dissents. See Dissenting Opinion.

It is ordered that appellant recover of appellee the costs herein.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ EDWIN T. HOFSTETTER
Judge
For the Court

(CONNORS, *J.*, of the 6th Appellate District, sitting for DAHLING, *P.J.*)

COOK, *J.*, Dissents
(See Dissenting Opinion)

Opinion of the Ohio Court of Appeals for the Eleventh Appellate District, Lake County, Ohio
(December 3, 1979)

Case No. 6-287

COURT OF APPEALS OF OHIO
ELEVENTH DISTRICT
COUNTY OF LAKE

MICHAEL MILKOVICH,
Plaintiff-Appellant,

vs.

THE LORAIN JOURNAL COMPANY, et al.,
Defendant-Appellees.

OPINION

Judges:

HON. EDWIN T. HOFSTETTER, *J.*; HON. ROBERT E. COOK, *J.*;

HON. JOHN J. CONNORS, JR., *J.*, Sixth District, by Assignment, for HON. ALFRED E. DAHLING, *P.J.*

HOFSTETTER, *J.*

The matter on appeal came on for trial before a jury. After the plaintiff-appellant rested his case, the defendants jointly moved the Court for a directed verdict in their favor on the ground that there is no justiciable issue for the jury, and that reasonable minds can come but to one conclusion, to-wit, that the proof fails to evidence by clear and convincing proof that the article which is the subject of this action was published with knowledge of its falsity or with reckless disregard as to its truth.

The trial court granted the motion in favor of the defendants, as follows:

> The Court finds that reasonable minds can come to but one conclusion, to-wit: that the evidence (construed most strongly in favor of the Plaintiff) fails to establish by clear and convincing proof that the article which was the subject of this action was published with knowledge of its falsity or in reckless disregard of the truth, and that there is no justiciable issue for the jury. Exceptions to the Plaintiff.

It is from this judgment, granting a directed verdict for the defendants, that plaintiff has appealed.

As background, the complaint in the court below was an action in libel filed by the plaintiff-appellant, Michael Milkovich, against the defendants, The Lorain Journal Publishing Company, owner and publisher of the Willoughby News-Herald, and Mr. Theodore Diadiun, as the result of the publication of a certain article on January 8, 1975. The article in question was stipulated at trial and admitted into evidence as plaintiff's Exhibit "D." (T.p. 12.)

The events which led to the eventual publication of this alleged libelous article began on the evening of February 9, 1974, at a routine high school wrestling match between Mentor High School and Maple Heights High School. The latter team was coached by the now-retired Michael Milkovich, appellant herein. It appears that, during and shortly after a wrestling match between Bob Girardi of Maple Heights and Paul Pochatilla of Mentor High School, a melee broke out among the fans and spectators in the crowd, and among the wrestling participants themselves. One of the defendants, Ted Diadiun, a sportswriter for The News-Herald, wrote a series of articles following the occurrence.

Following the altercation, a series of hearings were conducted by the Ohio High School Athletic Association (OHSAA) in Columbus, Ohio, following which the Maple team was totally suspended from state competition, and the appellant, Michael Milkovich, was censured.

It was at this time that a group of parents and wrestlers filed suit in Franklin County Common Pleas Court in an action styled "Barret v. Ohio High School Athletic Association." It was held by that Court that the OHSAA failed to safeguard certain due process rights in suspending the team from state competition, thereby denying the team members of important property rights without due process of law.

Immediately after the announcement of Judge Martin's decision reinstating the Maple team to state competition, the defendants published the alleged libelous article which headlined, "Maple Beat The Law With The Big Lie."

Factually, therefore, it should be noted that, following the alleged melee between the Maple and Mentor wrestling crowds, and as a result of hearings, the Ohio High School Athletic Association (OHSAA) suspended the Maple team from state competition. Defendant Diadiun attended both the wrestling meet between the two teams as well as the OHSAA hearing. The subsequent action against the OHSAA in Franklin County was brought to determine whether certain due process rights were accorded the Maple team before it was suspended from state competition. The defendant Diadiun did not attend that hearing. In the Franklin County trial had on November 8, 1974, the decision announced on January 7, 1975, as noted by the appellees in their brief, reversed the administrative action (of suspension). The reversal was on procedural grounds.

Pertinent to further discussion of defendants-appellee's publication on January 8, 1975, of the article which was headlined "Maple Beat The Law With The Big Lie" are the following statements made during the cross-examination of Diadiun:

Q. Now, when did you first become aware of the fact that this was a due process hearing and not a fault-finding hearing, if ever you became aware of it?

A. I thought that the fault-finding would be included in the trial, yes. I knew that due process was one of the issues. I also thought that one of the issues were (sic) whether or not—who was at fault.

• • • • •

Q. Isn't it a fact, Mr. Diadiun, that you never read any transcript of what occurred at that trial until after you published the article?

A. Yes.

• • • • •

Q. Didn't you think it was necessary for you to read that decision (of Judge Paul Martin of the Franklin County Common Pleas Court) before you published such an article?

A. Like I said, I knew the background of the whole case. I knew what Dr. Meyer told me went on at that trial. I didn't feel that I needed—

• • • • •

Q. The fact of the matter is, you never took the trouble to find that decision and read it, did you?

• • • • •

A. I didn't find the decision, no.

Q. You didn't find it necessary to read it?

A. No.

With the above as a fair predicate of the facts pertinent to our discussion of the directed verdict, the plaintiff-appellant assigned ten errors, as follows:

1. The Court erred in granting the motion of defendant-appellee for directed verdict at the close of testimony of the plaintiff;

2. The Court erred in its ruling that plaintiff failed to meet the burden of proof by clear and convincing evidence at the close of the testimony of the plaintiff, and that it was a necessary element for purposes of ruling upon a Motion For Directed Verdict;

3. The Court erred in its ruling that plaintiff was severely lacking in any evidence to prove defendants published the Article with "knowledge of its falsity";

4. The Court erred in its ruling by applying the incorrect law of Libel i.e. the Actual Malice test by omitting the proposition of law that the publisher acted with "*total disregard for truth or falsity*" and basing its findings exclusively upon the facts and law that plaintiff was severely lacking in any evidence to prove defendants published the Article with "*knowledge of its falsity*";

5. The Court erred in failing to apply the legal standards set forth in Rule 50(A) (4), in ruling upon defendant's Motion For Directed Verdict;

6. Should the Appellate Court apply Rule 50(A)(4) to the trial proceeding and ruling in the lower

court, then Appellant alleges the trial court erred in effect in its findings that:

(a) That reasonable minds could not draw different inferences or conclusions from the evidence presented, relevant to the Actual Malice test i.e. knowledge of its falsity, and/or defendant's total disregard for truth or falsity;

(b) That reasonable minds could come to but one conclusion, after construing the evidence most strongly in favor of the plaintiff, that there was no dispute, doubt, conflicting testimony, question, or any evidence in plaintiff's case to prove that defendant acted with Actual Malice i.e. knowledge of its falsity, and/or total disregard for truth or falsity in publishing the alleged libelous publication.

7. The Court erred in denying appellant the right to introduce into evidence the transcript of the record of the case of Ray Barrett v. OHSAA in the Court of Common Pleas, Franklin County;

8. The Court erred in its ruling upon defendant's Motion for Directed Verdict, by failing to mention the requirement set forth in Ohio Rule 50(E); and in fact, not construing the evidence most strongly in favor of the plaintiff;

9. The Court erred in its ruling by holding in effect that there was no controversial evidence of any determinative issue for the jury to weigh and that to submit the case to the jury would permit them an opportunity to do unreasonable harm to the parties.

10. The Court erred in its ruling that the defendants acted upon a reliable source.

In the instant case we have some of the attributes of *New York Times Co. v. Sullivan*, 376 U. S. 254, 11 L. Ed. 2d 686. However, we have the additional element involved that the alleged lies spoken of in the news article were made after judicial ascertainment of where the truth lay as it concerned the trial in which the alleged lies were supposedly uttered.

The *Sullivan* case, as we understand it, stands for the proposition that a public official or person such as the plaintiff herein is prohibited from recovering damage for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

All assignments except No. 7 and 10 direct themselves to the impropriety of granting the directed verdict. In furtherance of our above commentary, we hold that the trial court did err. In typical cases such as *Sullivan*, the libel alleged had still to be subjected to judicial process to determine whether libel existed. In the instant case, a court of law, based on the evidence before it, and having the right to determine where the truth lay, even though on a due process question, determined the truth in favor of the plaintiff and the wrestling team he coached. Thus he had his day in court and was, at that time at least, exonerated by the only recognized arbiter of the truth in our American judicial system but thereafter was still called a liar for the testimony he allegedly gave during that trial. Had the news article simply stated that the Court, in the newspaper's judgment, erred, or that the reporter's understanding of the facts differed from that of the Court, no question of libel would be before us. It would appear that, though the press might be at liberty to criticize the judicial process and the results of a given

case, unless and until the judgment of the Court is overturned on appeal, the determination of what constitutes the truth has been made. Thus any news article written either as fact as a news item, or as opinion, that is published knowing that it conflicts with a judicial determination of the truth, may, in our opinion, be regarded as a reckless disregard of the truth so as to constitute "actual malice" so as to be actionable libel of a public person. Whether in a given case, it constitutes a reckless disregard of the truth, is not, in our opinion, a question of law, but a question of fact based on the evidence before the Court.

Thus, where the evidence includes the factual data that (1) a decision was rendered by a trial court in Franklin County on a related matter, (2) that the defendant Diadiun acknowledged he knew such decision was rendered in favor of the plaintiff herein and his team of wrestlers, (3) that he did not attend that trial, and (4) that he did not read the transcript of that trial, it would appear that it is a jury question as to whether the reporter and his newspaper acted with reckless disregard of the truth.

We recognize that it has long been held that a motion for directed verdict raises a question of law only. *Michigan-Ohio-Indiana Coal Assn. v. Nigh, Admx.*, 131 Ohio St. 405. Further, if the facts are undisputed, this issue is one for the Court, but, where the circumstances are such that reasonable minds might reach different conclusions as to inferences to be drawn from the undisputed evidence, there arises a question of fact for the jury: *Bennett v. Sinclair Refining Co.*, 144 Ohio St. 139, 57 NE(2d) 776: *Snider v. Rollins*. 102 Ohio St. 372, 131 NE 733; *Slyder v. Commissioners*, 133 Ohio St. 143, 12 NE(2d) 407; *Yackee v. Napoleon*, 135 Ohio St. 344, 21 NE(2d) 111; *Hamden Lodge v. Ohio Fuel Gas Co.*, 127 Ohio St. 469, 189 NE 246.

For the reasons indicated, we find all assignments, except No. 7 and 10, at least to the extent they relate to the order granting a directed verdict for the defendants, are well taken.

Assignment No. 7, in our opinion, is without merit. The trial judge in that case was the arbiter of the facts. It was his duty to weigh and decide what was determined by the evidence. That determination having been made by that court, its judgment is final unless reversed on appeal. The question of whether the defendants had a justifiable basis for the publication of the "big lie" article so as to exonerate the defendants from either "actual malice" or such reckless disregard of the truth as to constitute malice as set forth in *Sullivan*, must, in our opinion, be predicated on the trial court's decision in that case and not on the evidence elicited therein.

Assignment No. 10, that the Court erred in its ruling that the defendants acted upon a reliable source, is well taken, although not for the reasoning expressed by the appellant. The reliability and believability of the source is for the trier of facts. Paragraphs 3 and 4 of the syllabus in *O'Day v. Webb*, 29 Ohio St. 2d 215, are pertinent, to wit:

> 3. A motion for directed verdict or a motion for judgment notwithstanding the verdict does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence.
>
> 4. It is the duty of a trial court to submit an essential issue to the jury when there is sufficient evidence relating to that issue to permit reasonable minds to reach different conclusions on that issue, or, conversely, to withhold an essential issue from

the jury when there *is not* sufficient evidence relating to that issue to permit reasonable minds to reach different conclusions on that issue.

We think the trial court erred in considering the question of the reliability of the source of the "defamatory" statements published when the basis for ruling on a directed verdict is not based on factual issues but on questions of law.

For the reasons indicated, the judgment of the trial court is reversed and the cause remanded for further proceedings.

JUDGE EDWIN T. HOFSTETTER

COOK, *J.* dissents (See Dissenting Opinion)
CONNORS, *J.*, concurs
(CONNORS, *J.*, of the 6th
Appellate District,
sitting for DAHLING, *P.J.*)
COOK, *J.* (Dissenting Opinion)

I respectfully dissent from the majority opinion of the Court.

The sole question in the instant cause is whether the trial court erred in granting appellee's motion for a directed verdict at the conclusion of the appellant's evidence.

Civ.R.50, in pertinent part, states:

"(4) When granted on the evidence. When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is

adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

A review of the evidence offered by the appellant in the proceedings below indicates reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion was adverse to the party against whom the motion was directed, the appellant.

The benchmark case in the libel law in the United States is *New York Times v. Sullivan*, 376 U.S. 254. In the *New York Times* case, the United States Supreme Court stated at pages 279-280:

"The constitutional guaranty of freedom of speech and press prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice', that is, with knowledge that it was false or with reckless disregard of whether it was false or not; such a qualified privilege of honest mistake of fact is required by the First and Fourteenth Amendments."

In *Curtiss Publishing Co. v. Butts*, 388 U.S. 130 the United States Supreme Court extended the First Amendment safeguards of the *New York Times* case to those defending libel actions brought by public figures as well as public officials. Appellant was found by the trial court to be a public figure.

Here, the newspaper article written by Ted Diadiun of the Willoughby News Herald was based on what he had personally observed at the wrestling match where the incident occurred and the testimony he had personally heard appellant give at the hearing before OHSAA and what he had supposedly learned about appellant's testimony

at a judicial hearing in the Franklin County Common Pleas Court from Dr. Harold Meyer, Commissioner of the OHSAA, in a telephone conversation. Diadiun concluded appellant had lied in the Franklin County court proceedings.

The important question is whether Ted Diadiun wrote his article with "actual malice" towards appellant, as required by the *New York Times* case. In other words, did Diadiun write his article knowing it was false or with reckless disregard of whether it was false or not.

At the conclusion of appellant's evidence in the court below, there was no evidence before the court that Diadiun wrote the article with "actual malice" against the appellant.

Rather, the evidence indicated Diadiun wrote the article based on his personal observations as to what occurred at the wrestling match and what appellant testified to at the OHSAA hearing in addition to what Dr. Meyer had indicated to him about appellant's testimony in court. Based on these sources of information, Diadiun expressed his opinion as to the statements of appellant in the Franklin County court proceedings. Appellant believed his article to be true.

I am of the opinion the article written by Diadiun falls within the limits of the court's words at page 269 of the *New York Times* case:

> "It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for vigorous advocacy no less than abstract discussion."

I would affirm the judgment of the trial court.

/s/ Robert E. Cook

Errata to Opinion of the Ohio Court of Appeals for the Eleventh Appellate District, Lake County, Ohio
(December 21, 1979)

Case No. 6-287

IN THE COURT OF APPEALS
Eleventh District

State of Ohio,
Lake County, ss.

MICHAEL MILKOVICH,
Appellant,

vs.

LORAIN JOURNAL CO., *et al.*,
Appellees.

JUDGMENT ENTRY ERRATA

It coming to the attention of this Court that an error exists on Page 3, Line 2 of the Dissenting Opinion of Judge Robert E. Cook, dated December 3, 1979, this Court sua sponte orders the Clerk of the Court of Lake County to strike the word "appellant" at said place in said Dissenting Opinion and, by pen, insert the word "appellee".

/s/ Robert E. Cook
Judge
For the Court

Supreme Court of Ohio's Order Dismissing Defendants' Appeal
(March 20, 1980)

No. 80-107

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

MICHAEL MILKOVICH,
Appellee,

vs.

LORAIN JOURNAL COMPANY, *et al.*,
Appellants.

APPEAL FROM THE COURT OF APPEALS
FOR LAKE COUNTY

This cause, here on appeal as of right from the Court of Appeals for Lake County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Lake County for entry.

Supreme Court of Ohio's Order Dismissing Defendants' Motion to Certify the Record
(March 20, 1980)

No. 80-107

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

MICHAEL MILKOVICH,
Appellee,

vs.

THE LORAIN JOURNAL COMPANY, *et al.*,
Appellants.

MOTION FOR AN ORDER DIRECTING
THE COURT OF APPEALS
FOR LAKE COUNTY
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

Supreme Court of Ohio's Order Denying Defendants' Motion for Rehearing
(April 25, 1980)

No. 80-107

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

MICHAEL MILKOVICH,
Appellee,

vs.

LORAIN JOURNAL COMPANY, *et al.*,
Appellants.

REHEARING

It is ordered by the court that rehearing in this case is denied.

United States Supreme Court's Order Denying Defendant's Petition for a Writ of Certiorari
(November 5, 1980)

No. 80-100

THE SUPREME COURT OF THE UNITED STATES

LORAIN JOURNAL CO., *et al.*,
Petitioners,

VS.

MICHAEL MILKOVICH, SR.,
Respondent.

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449 U.S. 966

No. 80-100. LORAIN JOURNAL CO. *et al. v.* MILKOVICH. Ct. App. Ohio, Lake County. Motions of Beacon Journal Publishing Co. et al. and Ohio Newspapers Association for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE STEWART would deny this petition for want of a final judgment. Reported below: 65 Ohio App. 2d 143, 416 N. E. 2d 662.

JUSTICE BRENNAN, dissenting.

This petition for certiorari raises an important question concerning limitations on the authority of trial courts to grant dismissals, summary judgments, or judgments notwithstanding the verdict[1] in favor of media defendants

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1. Although the decision below concerned directed verdicts, its holding would affect the courts' treatment of summary judgments and judgments notwithstanding the verdict as well. In each of these situations, the court is called upon to answer the same question: whether there is sufficient evidence for the jury to find actual malice under the applicable "clear and convincing evidence" burden of proof.

in libel actions, based on the qualified privilege outlined in *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964).

On January 8, 1975, the News-Herald of Willoughby, Ohio, published a column by sportswriter Ted Diadiun criticizing respondent Michael Milkovich, a wrestling coach at Maple Heights High School, who is treated as a "public figure" for purposes of this case. Headlined "Maple beat the law with the 'big lie'" the column accused Milkovich of lying about a fracas that occurred during one of his team's wrestling matches.

On February 9, 1974, the Maple High wrestling team, coached by Milkovich, faced a team from Mentor High School. A brawl involving both wrestlers and spectators erupted after a controversial ruling by a referee. Several wrestlers were injured. The Ohio High School Athletic Association (OHSAA) subsequently conducted a hearing into the occurrence, censured Milkovich for his conduct at the match, placed his team on probation for the school year, and declared the team ineligible to compete in the state wrestling tournament. Diadiun attended and reported on both the match and the hearing, at which Milkovich had defended his behavior. Thereafter, a group of parents and high school wrestlers filed suit in Franklin County Common Pleas Court, claiming that the OHSAA had denied the team due process. Milkovich, not a party to that lawsuit, appeared as a witness for the plaintiffs. On January 7, 1975, the court held that due process had been denied, and enjoined the team's suspension. *Barrett v. Ohio High School Athletic Assn.*, No. 74CV-09-3390.[2]

2. The court ruled that the wrestling team was denied its right to crossexamine witnesses and to call witnesses on its behalf. The court did not make any factual findings concerning the underlying occurrences, nor did it comment on those occurrences.

Diadiun did not attend the court hearing, review the transcript, or read the court's opinion, but he wrote a column about the decision based on his own recollection of the wrestling match and ensuing OHSAA hearing and on a description of the court proceeding given him by an OHSAA Commissioner. In the column, Diadiun stated that Milkovich and others had "misrepresented" the occurrences at the OHSAA hearing, and that Milkovich's testimony "had enough contradictions and obvious untruths so that the six board members were able to see through it." Diadiun went on to say, however, that at the later court hearing Milkovich and a fellow witness "apparently had their version of the incident polished and reconstructed, and the judge apparently believed them." Diadiun concluded that anyone who had attended the match "knows in his heart that Milkovich . . . lied at the hearing after. . . having given his solemn oath to tell the truth. But [he] got away with it."

Milkovich filed a libel action in state court against petitioners Diadiun, the News-Herald, and the latter's parent corporation. Petitioners moved for summary judgment. The court held that Milkovich is a public figure for purposes of the *New York Times* test,[3] but denied summary judgment. The action was then tried to a jury. After five days of trial, at the close of Milkovich's evidence, petitioners moved for a directed verdict. They argued that Milkovich had failed to proffer sufficient evidence from which the jury could conclude that Diadiun's column had been published with actual malice under the *New York Times* test. The court granted the motion for directed verdict, stating that the evidence, considered most strongly in favor of Milkovich, "fails to establish by clear

3. The ruling that Milkovich is a public figure is unchallenged.

and convincing proof that the article . . . was published with knowledge of its falsity or in reckless disregard of the truth."

Milkovich appealed to the State Court of Appeals, which reversed and remanded for trial. The court stated that Diadiun's column conflicted with the factual determination reached in the earlier Common Pleas Court injunctive action, and held that this conflict alone constituted sufficient evidence of actual malice to withstand petitioner's motion for directed verdict.[4] Petitioners appealed to the Ohio Supreme Court, and also sought review in the nature of certiorari. The Ohio Supreme Court dismissed the appeal as raising "no substantial constitutional question" and otherwise denied review. The court also denied petitioners' motion for rehearing.[5]

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4. The court stated:

"In the instant case, a court of law, based on the evidence before it, and having the right to determine where the truth lay, even though on a due process question, determined the truth in favor of the plaintiff and the wrestling team he coached. Thus, he had his day in court and was at that time at least, exonerated by the only recognized arbiter of the truth in our American judicial system, but thereafter was still called a liar for the testimony he allegedly gave during that trial. . . . It would appear that, though the press might be at liberty to criticize the judicial process and the results of a given case, unless and until the judgment of the court is overturned on appeal, the determination of what constitutes that truth has been made. Thus, any news article written either as fact as a news item, or as opinion, that is published knowing that it conflicts with a judicial determination of the truth, may, in our opinion, be regarded as a reckless disregard of the truth so as to constitute 'actual malice' so as to be actionable libel of a public person. Whether, in a given case, it constitutes a reckless disregard of the truth, is not, in our opinion, a question of law, but a question of fact based on the evidence before the court." 65 Ohio App. 2d 143, 146, 416 N. E. 2d 662, 666 (1979).

5. Although the appellate court below remanded the case for retrial, including a jury determination on the actual-malice issue, the decision was nonetheless a final judgment for purposes

(Continued on following page)

The import of the Ohio appellate court's holding is plainly that, even in the absence of proof of knowing falsehood or reckless disregard for the truth, a newspaper forfeits its right to a directed verdict, summary judgment, or judgment notwithstanding the verdict on the issue of actual malice if it has published a statement that conflicts, however tangentially, with a decision by a court. This holding is clearly contrary to the First Amendment and to the relevant precedents of this Court. I had supposed it was settled that newspapers are privileged to publish their views of the facts, so long as those views are not recklessly or knowingly false. It matters not that such views may conflict with those of a court, for the press is free to differ with judicial determinations. In the libel area, neither a court nor any other institution is the "recognized arbiter of the truth," as the court below asserted. See *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 339-340 (1974).[6]

One part of the "strategic protection" that decisions of this Court have extended to the press in the libel area is the insistence that a public figure can prevail "only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." *Gertz v. Robert Welch, Inc., supra*, at 342; *New York Times Co. v. Sullivan*, 376

Footnote continued—

of 28 U. S. C. § 1257. A decision in favor of petitioners would terminate the litigation, while a failure to decide the question now would leave the press in Ohio "operating in the shadow of . . . a rule of law . . . the constitutionality of which is in serious doubt." *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469, 486 (1975); *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, 246-247 (1974).

6. Indeed, at common law, a factual finding embodied in the judgment in another cause could not even be used as evidence of that fact in court. 5 J. Wigmore, Evidence § 1671a, pp. 806-807 (Chadbourn rev. 1974).

U. S., at 285-286. The court in a libel action has a responsibility to ensure that sufficient evidence of actual malice has been introduced to permit a jury finding under this exacting standard. This protection must not be withdrawn merely because the press account may have differed with the conclusions of a court, lest the "uninhibited, robust, and wide-open." *New York Times v. Sullivan, supra,* at 270, discussion of judicial proceedings be deterred. See *Richmond Newspapers, Inc. v. Virginia,* 448 U. S. 555 (1980).

The consequence of the erroneous ruling in this case is particularly apparent on the facts: petitioners were denied a directed verdict on the strength of a prior court opinion that did not even discuss, let alone decide, what had happened at the disrupted wrestling match or whether Milkovich had testified truthfully. The court had merely ruled that the Maple High School wrestling team was denied certain procedural safeguards required under due process. Thus, it is abundantly apparent that the state court's conclusion that Diadiun wrote this column "knowing that it conflicts with a judicial determination of the truth" is unpersuasive even on its own terms.

Because in my view the decision of the Ohio appellate court in this case seriously contravenes the principles of the First Amendment as interpreted by this Court, and threatens to chill the freedom of newspapers in Ohio to publish their view of the facts where they differ with the view of the courts, I dissent and would grant certiorari to review this important question of constitutional law.

Opinion of the Court of Common Pleas of Lake County, Ohio Concerning Defendants' Motion for Summary Judgment
(September 4, 1981)

Case No. 75 CIV 0301

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR.,
Plaintiff,

vs.

THE NEWS HERALD, *et al.*,
Defendants.

OPINION

Defendant The News Herald of Willoughby, Ohio, published a column written by Ted Diadiun on January 8, 1975, containing the following headline, "Maple beat the law with the 'big lie' ". The article takes issue with plaintiff, Michael Milkovich, head wrestling coach for the Maple Heights Wrestling team, specifically criticizing him for his actions and conduct while coaching one of the team's matches.

The incident in question arose on February 9, 1974, when Maple Heights was wrestling Mentor. During the match, a controversial call ignited a disturbance involving both teams. A subsequent hearing conducted by the Ohio High School Athletic Association (OHSAA) resulted in censoring Milkovich, placing the Maple Heights team on probation and declaring the Maple Heights team in-

eligible from further state wrestling tournament competition that year.

Thereafter, concerned parents and involved wrestlers filed a law suit in Franklin County Common Pleas Court claiming that they had been denied due process at the OHSAA hearing. Mr. Milkovich was a witness at this proceeding, though he was not a party thereto. Upon completion, the court held that complainants were in fact denied due process. Further, the court ordered that the suspension previously imposed by the OHSAA Board be removed. *Barrett v. Ohio High School Athletic Assn.*, Case No. 74 Civ 09-3390 (Ct. Common Pleas, Franklin County, Ohio, January 7, 1975).

It is undisputed that Diadiun attended both the wrestling match and the OHSAA hearing, and that he did not attend the due process proceeding in Franklin County. Nor did Diadiun read the transcript of the latter or review the actual opinion rendered by the Franklin County judge. Rather, he wrote a column based upon his own recollection of what had transpired at the two events he attended, supplemented by an oral accounting of what was testified to at the Franklin County proceedings by Dr. Harold Meyer, who also attended the OHSAA hearing.

In the article in question, Diadiun suggests that Milkovich "misrepresent[ed]" the facts as presented to the OHSAA Board of Control and that when testifying before Judge Paul W. Martin of the Franklin County Court of Common Pleas he "apparently had [the] version of the incident polished and reconstructed, and the judge apparently believed [him]." In closing the article, Diadiun alleges to the fact that anyone who "attended . . . knows in his heart that Milkovich . . . lied at the hearing after having given his solemn oath to tell the truth."

A libel suit, captioned *Milkovich v. The News Herald, et al.*, Case No. 75 CIV 301 (Ct. C.P. Lake County, Ohio), was filed naming Ted Diadiun, The News Herald of Willoughby, Ohio, and the latter's parent corporation as defendants. At the close of plaintiff's case in chief, defendants' moved for a directed verdict. This Court's predecessor, in granting the Motion for a Directed Verdict, wrote that construing the evidence most strongly in plaintiff's favor, such evidence "fails to establish by clear and convincing proof that the article . . . was published with knowledge of its falsity or in reckless disregard of the truth."

Plaintiff appealed the decision to the 11th District Court of Appeals of Ohio wherein the granting of the directed verdict was reversed and the cause remanded to this Court. *Milkovich v. Lorain Journal Co.*, 65 Ohio App. 2d 143, 416 N.E. 2d 662 (Ct. App. Lake County 1980).

Defendants then filed an appeal with the Ohio Supreme Court. In dismissing the appeal and denying defendants' Writ of Certiorari, the Court stated that no "substantial constitutional issue" was raised. Again a Writ of Certiorari was instituted, this time with the United States Supreme Court. This was subsequently denied. However, Mr. Justice Brennan issued a dissenting opinion, wherein he questioned the rationale of the 11th District Court of Appeals reversing the Lake County Court of Common Pleas and ordering the Court to reinstitute trial proceedings. *Lorain Journal Co., et al. v. Milkovich*, No. 80-100 (U. S. Sup. Ct. November 3, 1980).

In rendering its decision, the Court has considered the pleadings, the briefs, the applicable law and, through counsels' oral stipulation at the May 26, 1981, motion hear-

ing, the incorporation by reference of all the previously filed documentary evidence in testimonial form relative to this case.

The first trial Court made a determination that plaintiff Michael Milkovich was a public figure within the meaning of *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 154-55 (1967). This Court concurs in this finding.

The standard for reviewing defamation claims against public figures evolved from the landmark case of the *New York Times v. Sullivan*, 376 U.S. 254 (1964), where the United States Supreme Court held that the First Amendment of the United States Constitution,

> prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - that is with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. 376 U.S. at 279-80.

As a public figure, plaintiff must sustain the burden of proving that the article's libelous statements were made with actual malice. Constitutional protection afforded under the *New York Times* standard, *supra*, does not extend to a calculated lie or a statement written with reckless disregard for its truthfulness. However, utterances which are honest though inaccurate, are afforded protection. *Garrison v. Louisiana*, 370 U.S. 64, 75 (1964). *See generally, Time Inc. v. Pope*, 401 U.S. 279 (1971).

Traditionally, opinions were afforded a qualified privilege in libel actions if they amounted to "fair comment" on matters of public concern. This shield has been expanded by subsequent case law.

Today, opinions based on disclosed facts, dealing with matters publicly known, are absolutely privileged.

As stated originally in *Gertz v. Welch*, 418 U.S. 323, 339-40 (1974),

> [u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the consciences of judges and juries, but on the competition of other ideas.

See also Hoag v. Charlotte Republican Tribune, 5 Media L. Rptr. 1535, 1540 (Mich. Cir. Ct., Eaton County 1979).

Examining the applicable standard in cases similar to the one at bar, the Court finds that plaintiff, in order to successfully obtain a libel recovery, must establish that the article was published with actual malice. Particularly, he must set forth proof of convincing clarity that the publication was false or that the writer had serious doubts about its truth. This constitutes reckless disregard for the truth. *See, New York Times, supra* 376 U.S. at 286; *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Beckley Newspapers v. Hanks*, 389 U.S. 81, 83 (1967).

When a suit involves a public figure and/or a public official, the plaintiff must sustain the burden of proving a calculated falsehood. *Curtis v. Butts*, 388 U.S. 130, 153 (1967).

Furthermore, a defendant, in accordance with the *New York Times* standard, is not required to have even a reasonable belief regarding the truth of his publication. Merely that the defendant had no actual knowledge of the article's falsity or that he entertained no serious doubts as to its truth, is sufficient to successfully defeat a defamation claim. *Garrison v. Louisiana*, 379 U.S. 64, 78-79 (1964).

The Supreme Court of the United States held that the "reckless component of the actual malice" standard is not to be inferred from defendant's simple failure to act in conformity with the conduct of a prudent or reasonable reporter. *St. Amant, supra*, 390 U.S. at 731. *Pierce v. Capital Cities Communications, Inc.*, 576 F. 2d 495, 508 (3rd Cir. 1978), *cert. denied*, 439 U.S. 861 (1978). As in the *New York Times* case, *supra*, negligence on the part of a defendant in failing to ascertain the accuracy of its copy will not sustain a finding of actual malice. Proof of actual malice entails more than the establishment of simple negligence. As emphasized in *St. Amant v. Thompson, supra*,

> reckless conduct is not measured by whether a reasonably prudent man would have published or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

Id., 390 U.S. at 731. Fallibility is a human characteristic. As such, even the most skilled are prone, on occasion, to unwittingly commit an error or misstate a fact. *See also Hoffman v. Washington Post Co.*, 433 F. Supp. 600, 605 (Wash. D.C. 1977).

Likewise, courts have held that expressions of the writer's opinion can be forthright and critical. The fact that an opinion article subjects the plaintiff to public ridicule will not support plaintiff's claim of libel. Where a writer expresses his own personal opinions about the actions of another, regardless of how unreasonable or vituperous they may be, they remain the views of the writer and cannot be the basis for a libel suit. *Hotchner v. Castillo-Puche*, 551 F. 2d 910, 913 (2d Cir. 1977), *cert. denied*, 434 U.S. 834 (1977); *See also, Gertz, supra*, 418 U.S. at 339-40; *Buckley v. Littell*, 539 F. 2d 882, 893 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

Use of the term "liar" in an article which challenges another's veracity was found by this Court, in several cases, to constitute an expression of opinion. As in *Bennett v. Transamerican Press*, 298 F. Supp. 1013 (S.D. Iowa C.D. 1969), a charge of "liar" levied against a legislator was held to be merely an expression of the writer's opinion and not libelous under the *New York Times* standard. Similarly, the Court of Appeals in Illinois has also ruled that use of the term liar, in the appropriate content, would not be libelous. *See Wade v. Sterling Gazette Co.*, 56 Ill. App. 2d 101 (1965).

Traditionally, courts have placed a premium on free debate. Erroneous opinions are inevitable. But even the erroneous opinion is to be tolerated in order that self censorship not prevail over robust public debate.

After carefully examining the article in question, the Court is in disagreement with plaintiff's contention that it is a statement of fact and not one of opinion. Both the tone, the choice of language and the article's editorial format leave no room for doubt that Mr. Diadiun's purpose was to convey a heartfelt editorial, albeit highly emotional. Nonetheless, this article falls within the realm of opinion, and not within the scope of a factual news account.

Mr. Diadiun's article presents a social commentary recapitulating three separate incidents: a wrestling match fracas, a subsequent proceeding before OHSAA and a due process hearing in the Franklin County Court of Common Pleas. The column is replete with phraseology expressing

Mr. Diadiun's personal views. The article speaks of lessons to be learned, of the preeminent position of educators, of the latter's function as role models, of the susceptibility of young people and also of whether "might makes right". Indicative of the Court's finding that the article constitutes editorial comment is Diadiun's utilization of the following language: "[i]f you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up"; "I was in the unique position of being the only non-involved party"; "[t]o anyone who was at the meet"; "But unfortunately, . . . [they] apparently had their version of the incident polished", and finally "Anyone who attended the meet . . . knows in his heart that [they] . . . lied."

Plaintiffs next argue that even if the article is opinion, defendant's failure to disclose the facts upon which the column is based transforms it into a factual article, eliminating its privileged status. Plaintiff's statement of the law is accurate. However, the Court does not find that the facts support a finding that the author failed to fully disclose the basis upon which his opinions were formulated. *Accord, Pease v. Telegraph Publishing,* 7 Media Law Rptr. 1114, 1115-6 (New Hamp. 1981).

Mr. Diadiun states in the article that he attended and covered the wrestling match in question. He also was present at the OHSAA hearing. And while absent from the due process proceedings in Franklin County, he did obtain, first hand, a recounting from an observer by the name of Dr. Harold Meyer, who was also present at the OHSAA hearing.

Plaintiff, both in his brief and in Diadiun's depositions, raises the issue of Diadiun's awareness that the Franklin

County proceedings was a due process hearing and not a trial on the merits. While some confusion may have been present as to Diadiun's perception of these proceedings, this confusion was not conveyed in the article. Paragraph three of the article relates, without a doubt, that the sole issue before the Franklin County Court was the denial of due process.

Furthermore, a close reading of the Franklin County decision verifies only that Maple Heights High was found to have been denied particular procedural safeguards required by due process by the OHSAA hearings. That Court made no factual determination as to what transpired on the night in question. Wherefore, plaintiff's contentions that Diadiun's article was written with full knowledge that it conflicted with a judicial determination of the truth is not well taken.

The Court finds as a matter of law that the article in question is an editorial column. As such, the plaintiff cannot, within the confines of constitutional law, recover in a libel action.

Even assuming for the moment, that the privilege afforded is not applicable, plaintiff has failed to prove his case by the clear and convincing weight of the evidence standard, imposed on libel cases. *Gertz, supra,* 418 U.S. at 342; *New York Times, supra,* 376 U.S. at 285-86. It is plaintiff's burden to set forth the evidence he will introduce at trial substantiating his claims of constitutional malice. *Fadell v. Minneapolis Star & Tribune Co., Inc.,* 557 F. 2d 107, 108 (7th Cir. 1977), *cert. denied,* 434 U.S. 966 (1977); *Craig v. Moore,* 4 Med. L. Rptr. 1402 (Fla. Cir. Ct. Duval County 1978). *See Wasserman v. Time Inc.,* 424 F. 2d 920, 922 (D.C. Cir. 1970), *cert. denied,* 398 U.S. 940 (1970).

The issue of malice must be set forth by the plaintiff with convincing clarity. The Court, in applying this standard, is bound to examine only that evidence pertinent to the resolution of material questions of fact. Absent plaintiff's ability to persuade the trier of fact by presenting clear and convincing evidence regarding the issue of malice, movant would be entitled to a judgment as a matter of law. *Fadell, supra*, 557 F. 2d at 108; *See Dupler v. Mansfield Journal Co., Inc.*, 64 Ohio St. 2d 116, 413 N.E. 2d 1187 (1980); *Hahn v. Kotten*, 43 Ohio St. 2d 237, 331 N.E. 2d 713 (1975).

Furthermore, plaintiff cannot rest on mere allegations and arguments. Nor can he stand on the defense that disputes of nonmaterial fact conceivably could be resolved in plaintiff's favor. *See generally Thompson v. Evening Star Newspaper Co.*, 394 F. 2d 774 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 890 (1968).

Plaintiff's proof necessarily must consist of evidence of convincing clarity and of sufficient probative value to manifestly demonstrate on defendant's part a knowing falsity or a reckless disregard for the truth. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F. 2d 858 (5th Cir. 1970). In effect, the burden of proceeding forward shifts to the plaintiff to affirmatively demonstrate that he can document proof of actual malice at trial. *United Medical Laboratories v. Columbia Broadcasting System, Inc.*, 404 F. 2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969); *Drye v. Mansfield Journal Corp.*, 32 Ohio Misc. 70, 288 N.E. 2d 856 (Ct. Common Pleas, Richland County 1972).

Unlike the general civil practice that summary judgments should be sparingly granted, use of the summary judgment route in defamation cases is the rule rather than the exception. As was stated in *Washington Post Co. v. Keogh*, 365 F. 2d 965, 968 (D.C. Cir. 1966),

> One of the purposes of the [New York Times] principle . . . is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights . . . . The threat of being put to the defense of a lawsuit brought by a public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to the advocates of unpopular causes.

See also, Guitar v. Westinghouse Electric Co., 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975).

To require that these defendants incur the expense of a trial, in a matter where no clear and convincing proof of constitutional malice has been presented by documentary evidence in testimonial form, would be against the tenets of the *New York Times* doctrine. Clearly, such an abrogation contravenes the plethora of constitutional authority to the contrary. A plaintiff who is a public figure, must of necessity, make a more persuasive showing than that required of a private citizen in order to defeat a movant's motion for summary judgment. Plaintiff, in the instant cause of action, has not met this burden of proof. *See, Loeb v. New Times*, 497 F. Supp. 85 (S.D.N.Y. 1980).

The protection afforded the freedom of speech clause of the First Amendment was recently addressed by the United States Supreme Court in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). Therein the *Bellotti* court wrote,

> [t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of substantial punishment. . . . Freedom of discussion, if it would

> fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940).

In summary, in order for a Court to properly grant a motion for summary judgment, where privilege is involved, defendant needs to show that plaintiff has not alleged facts, which, if proven, would be sufficient to support his contention that defendants had acted with malice, both in the writing and in the printing of the article in question. Plaintiff's documentary evidence fails to substantiate the existence of actual malice by clear and convincing proof.

In the case at bar, two divergent interpretations of a series of distinct, yet intertwined, events are presented. In the process, a column was written expressing the view that plaintiff had lied while under oath testifying before a due process hearing in Franklin County. A close examination of that case, entitled *Barrett v. Ohio High School Athletic Association*, *supra*, underscores the point that no judicial determination or finding of fact was rendered. Nor did the Court of Common Pleas of Franklin County comment on the events or the actions undertaken by the litigants at bar. Rather, it was presented with and addressed only the issue of procedural due process. Absent this factual determination, plaintiff's proof of actual malice fails when measured against the required standard of clear and convincing proof.

This Court holds that defendant's Motion for Summary Judgment must be granted. This Court finds that the article in question constitutes editorial opinion. Further, the Court finds ample disclosure upon which defendant Diadiun bases his opinions. Therefore, this article is

afforded constitutional protection and cannot serve as the basis for a defamation suit.

Furthermore, were this Court to find that the article in question was predominately a factual one, summary judgment is still appropriate due to plaintiff's failure to establish a prima facie existence of actual malice. Applying the standard as outlined above to the facts in the instant case, and construing the same most strongly in the favor of the non-moving plaintiff, the Court finds that there is no quantum of evidence upon which a trier of fact could find proof of convincing clarity relative to the issue of actual malice.

Therefore, the Court finds that reasonable minds can come to one conclusion, said conclusion being adverse to the non-moving party. Accordingly, defendant's Motion for Summary Judgment is granted as a matter of law.

Exceptions are noted for the plaintiff.

Prevailing counsel shall prepare a Judgment Entry signed by counsel in accordance with this Court's Opinion.

/s/ JAMES W. JACKSON
Judge of the Court of Common Pleas

Judgment Entry of the Court of Common Pleas of Lake County, Ohio Granting Defendants' Motion for Summary Judgment
(September 28, 1981)

Case No. 75 CIV 0301

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR.,
Plaintiff,

VS.

THE NEWS HERALD, *et al.*,
Defendants.

JOURNAL ENTRY JUDGMENT

This cause came on to be heard by leave of court first obtained and pursuant to Ohio Civil Rule 56 upon the pleadings, the Defendant's Motion for Summary Judgment, the affidavits, depositions, stipulations of counsel, including the incorporation by reference of the previously filed documentary evidence in testimonial form relative to the case, and the briefs of counsel.

The Court being fully advised in the premises, finds in favor of the Defendants and finds that there is no genuine issue as to any material fact and that the Defendants' Motion for Summary Judgment should be and hereby is granted for the reasons set forth in the Opinion of the Court filed September 4, 1981, which is attached hereto,

marked Exhibit A, and made a part hereof by reference as though fully rewritten herein.

Accordingly, judgment is rendered against the Plaintiff and in favor of the Defendants with costs of this action chargeable to the Plaintiff. It is so Ordered.

/s/ JAMES W. JACKSON
Judge

Opinion of the Ohio Court of Appeals for the Eleventh Appellate District, Lake County, Ohio
(October 3, 1983)

No. 9-012

COURT OF APPEALS OF OHIO,
ELEVENTH DISTRICT, COUNTY OF LAKE

MICHAEL MILKOVICH, SR.,
Plaintiff-Appellant,

vs.

THE NEWS-HERALD, *et al.*,
Defendants-Appellees.

OPINION

The record shows that an altercation occurred during a wrestling match on February 8, 1974 between Maple Heights High School and Mentor High School which caused a violent disturbance injuring several people. The Ohio High School Athletic Association (OHSAA) conducted a hearing, which resulted in censoring plaintiff, placing the Maple Heights team on probation and declaring Maple Heights ineligible for further state wrestling tournament competition that year.

Subsequently, parents and members of the wrestling team filed an action in Franklin County Common Pleas Court, which held that they were denied due process and ordered the suspension imposed by OHSAA removed.

Defendant, The News-Herald, published a column written by Ted Diadiun on January 8, 1975. The article was

critical of plaintiff, who was head wrestling coach at Maple Heights, for his actions and conduct while coaching one of the team's matches immediately prior to the foregoing incidents. Whereupon, plaintiff filed a libel action, which was tried to a jury in early 1979. At the close of plaintiff's evidence, the trial court directed a verdict for defendants on the ground that the evidence failed to show by clear and convincing proof that the article was published with actual malice.

Plaintiff appealed and the appellate court reversed on the basis that reasonable minds could find actual malice. [See *Milkovich v. Lorain Journal Co.* (1979), 65 Ohio App. 2d 143.] Thereafter, on remand, the trial court granted defendants' motion for summary judgment.

Plaintiff now asserts seven assignments of error as follows:

"1. The Trial Court erred in granting Appellees' motion for summary judgment after this Court had mandated that the case be retried so that a jury could determine whether Appellees had acted with actual malice.

"2. The Trial Court erred in granting Appellees' motion for summary judgment because there are genuine issues of material fact in dispute between the parties.

"3. The Trial Court erred in granting Appellees' motion for summary judgment because appellees were not entitled to judgment as a matter of law.

"4. The Trial Court erred in holding that Michael Milkovich was a public figure and that he is required to show actual malice before recovering for damage to his reputation.

"5. The Trial Court erred in holding that the defamatory falsehoods published by Appellees about Michael Milkovich were constitutionally-protected opinions rather than assertions of fact or opinions stated without disclosing the underlying bases therefore.

"6. The Trial Court erred in holding that Michael Milkovich had not demonstrated, by clear and convincing evidence, that Appellees had acted with actual malice in publishing false and defamatory statements about him when the same evidence was before the Trial Court that this Court has already held to be sufficient.

"7. The Trial Court erred in granting Appellees' motion for summary judgment where Michael Milkovich presented evidence showing that Appellees had published false statements about him in violation of their duty, under Ohio law, to exercise reasonable care to avoid publishing such falsehoods and where Appellees denied having done so, thus creating a genuine issue of material fact."

As to plaintiff's first assignment of error, this court previously reversed the trial court's judgment and remanded the case for "further proceedings." Traditionally, "[b]y reversal, a judgment is made void, and the matters litigated in the case reversed, again become open for litigation between the same parties." *Hinton v. McNeil* (1832), 5 Ohio St. 509, 511. Hence, the trial court had the discretion to consider a motion for summary judgment as "further proceedings." Such proceedings could properly include a review of new issues not previously raised.

Therefore, plaintiff's first assignment of error is overruled.

Plaintiff's fourth and sixth assignments of error are interrelated and are considered together. It is well settled that newspaper articles concerning public figures or public officials, including false statements of fact, are not actionable unless published with actual malice. *New York Times v. Sullivan* (1964), 376 U.S. 254; *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130; *Dupler v. Mansfield Journal* (1980), 64 Ohio St. 2d 116. Actual malice is defined as knowledge that the statement is false or reckless disregard for the truth. *New York Times* at 279-280; *Dupler* at 119. Public figure is defined as one who, by reason of his achievements, secures public attention. *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323.

The record shows that plaintiff is definitely a public figure. His outstanding record as a wrestling coach and leader in his profession is well documented in the transcript. Similar to *Butts*, *supra*, Milkovich has a list of impressive credentials, which conclusively demonstrates his prominence. Consequently, as a public figure, plaintiff was required to establish by clear and convincing evidence that the statements were published with actual malice, that is, with knowledge of their falsity or reckless disregard of the truth. *Dupler*, *supra*, at 119. Summary judgment is proper when the court finds there is no genuine issue of material fact concerning the existence of actual malice.

The "knowledge of falsity" for actual malice requires the publisher to have actually known the article was false when published. *Sullivan*, *supra*, at 279-280. A publication's falsity alone is insufficient to establish actual malice. In this case, there is no evidence of actual knowledge, and particularly no evidence of a clear and convincing quality.

The "reckless disregard of the truth" aspect of actual malice requires the publisher to have either a high degree

of awareness of the probability that a statement is false, or serious doubts of the truth thereof. The fact that the court previously found in plaintiff's favor does not make such finding a conclusive determination of truth. Consequently, this alone does not make defendant's assertion that plaintiff lied reach the level of actual malice.

The evidence in this case, when construed most strongly for plaintiff, does not show the article was published with actual malice as evidenced by a reckless disregard for the truth.

Thus, plaintiff's fourth and sixth assignments of error are overruled.

Plaintiff's fifth assignment of error is also not well taken. A statement of opinion encompasses a privilege which is not applicable to a statement of fact. The United States Supreme Court in *Gertz, supra*, at 339-340 stated:

> "* * * Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. * * *"

This privilege respecting statements of opinion is a qualified one, giving rise to an action in libel only when the article does not disclose the facts upon which the opinion is based. *See, e.g., Orr. v. Argus-Press Co.* (6th Cir. 1978), 586 F.2d 1108, *cert. denied* (1979), 440 U.S. 960. Moreover, whether a publication constitutes an opinion in the constitutional sense is a question of law.

The trial court found as a matter of law the article in question is an editorial opinion. The trial court's rationale is set forth in its opinion as follows:

> "Traditionally, courts have placed a premium on free debate. Erroneous opinions are inevitable. But even the erroneous opinion is to be tolerated in order that self censorship not prevail over robust public debate.
>
> "After carefully examining the article in question, the Court is in disagreement with plaintiff's contention that it is a statement of fact and not one of opinion. Both the tone, the choice of language and the article's editorial format leave no room for doubt that Mr. Diadiun's purpose was to convey a heartfelt editorial, albeit highly emotional. Nonetheless, this article falls within the realm of opinion, and not within the scope of a factual news account.
>
> "Mr. Diadiun's article presents a social commentary recapitulating three separate incidents: a wrestling match fracas, a subsequent proceeding before OHSAA and a due process hearing in the Franklin County Court of Common Pleas. The column is replete with phraseology, expressing Mr. Diadiun's personal views. The article speaks of lessons to be learned, of the preeminent position of educators, of the latter's function as role models, of the susceptibility of young people and also of whether 'might makes right'. Indicative of the Court's finding that the article constitutes editorial comment is Diadiun's utilization of the following language: '[i]f you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up'; 'I was in the unique position of being the only

non-involved party'; '[t]o anyone who was at the meet'; 'But unfortunately, . . . [they] apparently had their version of the incident polished', and finally 'Anyone who attended the meet . . . knows in his heart that [they] . . . lied.'

"Plaintiffs next argue that even if the article is opinion, defendant's failure to disclose the facts upon which the column is based transforms it into a factual article, eliminating its privileged status. Plaintiff's statement of the law is accurate. However, the Court does not find that the facts support a finding that the author failed to fully disclose the basis upon which his opinions were formulated. *Accord, Pease v. Telegraph Publishing,* 7 Media Law Rptr. 1114, 1115-6 (New Hamp. 1981).

"Mr. Diadiun states in the article that he attended and covered the wrestling match in question. He also was present at the OHSAA hearing. And while absent from the due process proceedings in Franklin County, he did obtain, first hand, a recounting for an observer by the name of Dr. Harold Meyer, who was also present at the OHSAA hearing."

The record supports the trial court's analysis. Moreover, the article, as an opinion, disclosed its underlying facts. The writer, as indicated above, referred to events and circumstances upon which he based his opinion. The article did not present a factual news account. Rather, it summarized the writer's ideas, opinions and conclusions derived collectively from a number of related events which were plainly referred to therein.

The article substantiates its nature and editorial purpose. It appears in the sports editorial column labeled "TD says". Further, it is presented by a highly opinion-

ated title, "Maple beat the law with the 'big lie' ", which does not suggest a factual news account of a specific event, but instead presents the writer's personal opinion. Thus, the article is privileged as it constitutes a statement of opinion concerning publicly known matters and discloses the underlying facts which provide the basis for the opinions expressed in the article.

Therefore, plaintiff's fifth assignment of error is overruled.

Finally, plaintiff's second, third and seventh assignments of error are interrelated and are considered together. As applied to this case, Civ. R. 56(C) provides that summary judgment is proper when, after all the evidence is construed most strongly in favor of the plaintiff, reasonable minds can only conclude that the article in question is a constitutionally-protected opinion; that plaintiff is a public figure and that plaintiff has failed to raise a genuine issue of material fact to find actual malice under the applicable burden of proof.

After a complete review of the record, and construing the evidence most strongly for plaintiff, the court correctly determined that reasonable minds could only conclude the article qualified as a constitutionally-privileged opinion. Furthermore, the court found that plaintiff is a public figure and there is simply nothing in the record to the contrary. Consequently, as a public figure or a public official, he is required to present a genuine issue of material fact which would clearly and convincingly establish that the article was published with actual malice. *Dupler, supra.* The trial court correctly found that the record does not present such issue. Finally, the trial court correctly concluded that the article was a constitutionally-protected opinion. Therefore, the trial court properly granted summary judgment to defendants.

Accordingly, plaintiff's second, third and seventh assignments of error are overruled.

For the foregoing reasons, the judgment is affirmed.

Judgment affirmed.

/s/ ARCHER E. REILLY
REILLY, J., of the Tenth Appellate District, sitting by assignment in the Eleventh Appellate District.

COOK, P. J.,
FORD, J., Concur.

Judgment Entry of the Ohio Court of Appeals for the Eleventh Appellate District, Lake County, Ohio
(October 3, 1983)

No. 9-012

IN THE COURT OF APPEALS
ELEVENTH DISTRICT
STATE OF OHIO, COUNTY OF LAKE

MICHAEL MILKOVICH, SR.,
Appellant.

VS.

THE NEWS-HERALD, *et al.*,
Appellees.

JUDGMENT ENTRY

This cause came on to be heard upon the Record in the Trial Court, and was briefed and argued by counsel for the parties.

Upon consideration whereof, this Court finds no error prejudicial to the appellant and, therefore, the judgment of the Trial Court is affirmed. Each Assignment of Error was reviewed by the Court and disposed of as set forth in this Court's Opinion, which is incorporated herein by reference.

It is ordered that the costs shall be taxed against the appellant.

This Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ ARCHER E. REILLY

Judge (Tenth Appellate District, By Assignment) For the Court

Opinion of the Supreme Court of Ohio
(December 31, 1984)

No. 84-1833

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

MICHAEL MILKOVICH, SR.,
Appellant,

vs.

THE NEWS HERALD, *et al.*,
Appellees.

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15 Ohio St. 3d 292

Defamation—Libel—"Public figure" or "public official," construed—"Opinions" actionable, when.

APPEAL from the Court of Appeals for Lake County.

Plaintiff-appellant, Michael Milkovich, Sr., is the former head wrestling coach of Maple Heights High School in Cuyahoga County. On February 9, 1974, appellant's wrestling team had a meet with Mentor High School. A fight broke out involving spectators and team members from both squads after a Maple Heights wrestler was disqualified by the referee.

As a result of the altercation, the Ohio High School Athletic Association ("OHSAA") held hearings and issued

sanctions against the Maple Heights team, including a disqualification from the state tournament, a one-year probationary status, and a censuring of appellant.

Thereafter, concerned parents and involved wrestlers filed an action in the Court of Common Pleas of Franklin County challenging the OHSAA's sanctions on due process grounds. Although appellant was called as a witness to testify at this proceeding, he was not a party to the action. The trial court ruled that OHSAA violated due process in imposing the sanctions and ordered that the suspension imposed be removed. *Barrett v. Ohio High School Athletic Assn.* (Jan. 7, 1975), Franklin C.P. No. 74 Civ. 09-3390, unreported.

The day after the trial court's decision, defendant-appellee Theodore Diadiun, a sports writer for defendant-appellee The News-Herald in Willoughby, wrote and published a newspaper article entitled "Maple beat the law with the 'big lie.'" The article was continued to the inside of the paper where the headline read "* * * Diadiun says Maple told a lie." The article went on to allege, *inter alia*, that appellant and the former superintendent of the Maple Heights School District "* * * lied at the hearing after each having given his solemn oath to tell the truth." The record indicates that Diadiun did attend the wrestling match and OHSAA hearing, but not the Franklin County judicial proceedings.

Appellant commenced the instant defamation action in the Court of Common Pleas of Lake County against The News-Herald, its parent company Lorain Journal Co., and Diadiun. Appellant, in his original and amended complaints, alleged that the following passages of the Diadiun article were actionable and libelous:

"Maple beat the law with the 'big lie.'"

"* * * a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

"A lesson which, sadly, in view of the events of the past year, is well they learned early.

"It is simply this: If you get in a jam, lie your way out.

"If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

"The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools, H. Donald Scott."

"Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

"But they got away with it.

"Is this the kind of lesson we want our young people learning from their high school administrators and coaches?

"I think not."

Prior to trial, the trial court determined that appellant was a public figure, and as such, would be required to establish actual malice on appellees' part under *New York Times Co. v. Sullivan* (1964), 376 U.S. 254.

A jury trial was held, but at the close of appellant's case, the trial court directed a verdict in favor of all the appellees on the basis that appellant had failed to

establish, by clear and convincing evidence, that the article was written and published with actual malice.

Upon appeal, the court of appeals reversed and remanded, holding that a reasonable jury could have found that appellees acted with actual malice toward appellant. *Milkovich v. Lorain Journal Co.* (1979), 65 Ohio App. 2d 143 [19 O.O.3d 99]. This court overruled appellees' motion to certify the record (case No. 80-107), and the United States Supreme Court in *Lorain Journal Co. v. Milkovich* (1980), 449 U.S. 966, denied certiorari over the published dissent of Justice Brennan.

Upon remand, the appellees filed a motion for summary judgment contending that the alleged libel was protected because it amounted to an expression of opinion. The trial court agreed, and granted summary judgment in favor of appellees.

Upon appellant's appeal to the court of appeals, the trial court's decision was affirmed. The appellate court held that appellant was a public figure and had failed to prove that the alleged libel was done with actual malice. The court further held that the article was a constitutionally protected opinion.

The cause is now before this court upon the allowance of a motion to certify the record.

Mr. Brent L. English, for appellant.

Wickens, Herzer & Panza Co., L.P.A., Mr. David L. Herzer, Mr. Richard D. Panza, Mr. Richard A. Naegele and *Mr. John J. Hurley, Jr.*, for appellees.

Per Curiam. The matter presented for our review involves important First Amendment considerations which require us to weigh the important interests of an uninhibited press and the need for judicial redress of libelous utterances.

I

The first issue before this court is whether appellant Milkovich is a "public figure" or "public official" as a matter of law.

The appellees argue that appellant is precluded from raising the issue that he is not a public figure, because he failed to preserve the issue during the initial appellate process of the cause.

In rejecting this argument we find that upon a careful review of the record, appellant has not waived this issue, and therefore, the issue is properly presented before this court.

In determining the status of appellant with respect to defamation law, a review of the pertinent United States Supreme Court decisions in this area is in order.

In the seminal case of *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, the Supreme Court held that public officials could not recover for defamation absent proof by clear and convincing evidence that such defamation was undertaken with "actual malice." (Hereinafter referred to as "*N.Y. Times* standard.") Such a standard was similarly adopted by this court in *Dupler v. Mansfield Journal* (1980), 64 Ohio St. 2d 116 [18 O.O.3d 354].

Then, in *Rosenblatt v. Baer* (1966), 383 U.S. 75, the high court stated that the inquiry into whether one is a public official is necessarily a question of law for the trial judge to determine.

The Supreme Court extended the *N.Y. Times* standard to cover "public figures" in *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130. In that case, the court defined a public figure as one who commanded a substantial amount of public interest by his status alone, or one who had

thrust himself by purposeful activity into the vortex of an important public controversy. The court reasoned that public figures should be held to the more difficult *N.Y. Times* standard because public figures have sufficient access to the means of counterargument in order to expose the falsity of the defamation complained of. *Id.* at 155.

The court further extended the *N.Y. Times* standard in *Rosenbloom v. Metromedia, Inc.* (1971), 403 U.S. 29, to private individuals where the matter reported was of concern to the public. *Rosenbloom* was a plurality opinion, and marked the most comprehensive application of the *N.Y. Times* standard. However, the rule of law set forth in *Rosenbloom* was unable to command a majority vote of the justices, and revealed the disagreement within the court that, perhaps, the application of the *N.Y. Times* standard was in need of further refinement.

We believe that if *Rosenbloom* and *Butts* were the last statements made by the high court concerning the definition of a public figure or official, we would be compelled to agree with the courts below that Milkovich is a public figure, and that the *N.Y. Times* standard would be applicable to his claim for relief. Needless to say, the *Rosenbloom* extension of the *N.Y. Times* standard to private individuals was reexamined in *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, and the Supreme Court retreated from its prior holding. In *Gertz*, the high court acknowledged the necessity of maintaining the *N.Y. Times* standard with respect to public figures and officials in order to fortify First Amendment freedom and to prevent self-censorship by the media. However, the court stated that the need to avoid self-censorship by the media was not the only societal value at issue. *Id.* at 341. With respect to private individuals, the court held that a different standard must apply in order to protect the state's interest

in compensating injury to the reputation of private persons. Therefore, the *Gertz* court redefined the meaning of a public figure in the following manner:

"For the most part those who attain this status [as a public figure] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 345.

The court in *Gertz* also noted that a person can become a public figure for a limited range of issues by being drawn or voluntarily injecting himself into a particular public controversy. In holding that Gertz was not a public figure for the purposes of defamation law, the court stated that although Gertz was well known in some circles, he had achieved no general fame or notoriety in the community, and had no persuasive involvement in the affairs of society. *Id.* at 351-352.

Two years later, the high court had before it the case of *Time, Inc. v. Firestone* (1976), 424 U.S. 448. In *Firestone*, the court reiterated its holding in *Gertz* with respect to the definition of a public figure, and held that the plaintiff, Mrs. Firestone, was not a public figure under *Gertz*. In spite of the fact that Mrs. Firestone was prominent among the "400" of Palm Beach Society, that she had subscribed to a press clipping service which evidenced her frequent mention in the printed medium, and that she had held several press conferences during the course of her divorce proceedings (*id.* at 484-485 [dissenting opinion]), the court found that the *Gertz* definition of public figure status had not been satisfied. The court also stated

that Mrs. Firestone's divorce proceeding was not the type of "public controversy" envisioned in *Gertz*. *Id.* at 454.

More recently, the Supreme Court sustained the *Gertz* characterization of a public figure in *Hutchinson v. Proxmire* (1979), 443 U.S. 111, 134; and *Wolston v. Reader's Digest Assn., Inc.* (1979), 443 U.S. 157, 164.

Turning our attention to the matter at hand, the appellees herein contend that in view of the accomplishments and honors earned by Milkovich in the area of high school wrestling,[1] the lower courts properly designated

1. The following comprises a list of achievements and distinctions which, appellees contend, relegate Milkovich to the status of a public figure:

"(a) National Coach of the Year Award, Portland, Oregon, 1977.

"(b) Received Congressional Record Citation.

"(c) National Council of High School Coaches Award.

"(d) Inducted into the National Helms Hall of Fame.

"(e) National Achievement Award for 100 victories without loss by 'Scholastic Wrestling News'.

"(f) Conducts wrestling clinics throughout the United States Sponsored by State Associations and Coaches Organizations.

"(g) Speaker at Coaches Associations throughout United States: South Carolina, Florida, New York, Indiana, all over the nation.

"(h) No other coach in United States ever close to his record.

"(i) Honored with citation from Ohio Senate.

"(j) Honored with citation from Ohio House of Representatives.

"(k) Charter member, Ohio Coaches Hall of Fame.

"(l) Received United States Wrestling Federation Award.

"(m) Honored and cited by Council of City of Cleveland.

"(n) Honored by City of Maple Heights: Mike Milkovich Day.

"(o) Past President, Ohio Coaches Association.

"(p) Conducts wrestling school at Baldwin-Wallace College.

(Continued on following page)

him as a public figure. Appellees submit, and the court of appeals agreed, that the *Butts* decision is quite similar to the case at bar in that both Butts and Milkovich attained pervasive notoriety in their respective communities as prominent sports personalities, and that, therefore, Milkovich must be held to be a public figure in the same manner as Butts.

We disagree, and find that such a determination by this court would require us to ignore the redefinition of the public figure status as enunciated in *Gertz* and its progeny. In applying the *Gertz* standard to the case *sub judice*, we hold that Milkovich is not a public figure as that term is utilized in First Amendment analysis. While appellant may be an individual recognized and admired in his community for his coaching achievements, he does not occupy a position of persuasive power and influence by virtue of those achievements. By the same token, appellant's position in his community does not put him at the forefront of public controversies where he would attempt to exert influence over the resolution of those controversies. While appellant did become involved in a controversy surrounding the events during and subsequent to his team's wrestling match with Mentor High School, appellant never thrust himself to the forefront of that controversy in order to influence its decision. Furthermore, it cannot be said

Footnote continued—

"(q) Speaker at schools.

"(r) Teams have 265 wins against 25 losses.

"(s) Honored for winning four consecutive state titles.

"(t) Winner of ten (10) Ohio state team titles.

"(u) Placed team in top 3 of Ohio 22 out of 25 years.

"(v) Received Kent State University Hall of Fame Award.

"(w) Honored with gifts, proclamations, and awards on retirement." (Citations to record omitted.)

that appellant assumed the risks of public life through the advertisement of his wrestling clinics. If this were the case, then any widespread advertisement for purely business purposes could result in the classification of an individual as a public figure. Given the application of the public figure definition since *Gertz*, we find appellant's status to be akin to the status of the plaintiff in *Firestone*, *supra*, rather than the status of the athletic director in *Butts*, *supra*.

Likewise, we reject appellees' argument that appellant is also a "public official" by virtue of his employment as a public high school teacher and coach. The United States Supreme Court stated in *Rosenblatt*, *supra*, at 85:

"• • • It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."

Our interpretation of *Rosenblatt* leads us to conclude that the facts of the instant case are insufficient to qualify appellant as a public official for the purposes of defamation law. While appellees place great reliance on the case of *Johnston v. Corinthian Television Corp.* (Okla. 1978), 583 P.2d 1101, where a grade school wrestling coach was held to be a public official, we find that a similar interpretation by this court would unduly exaggerate the "public official" designation beyond its original intendment. In any event, we are unpersuaded that the *Rosenblatt* definition of a public official was intended to encompass a person like appellant under the facts and circumstances contained in the instant cause.

Therefore, we hold that for the purposes of defamation law and analysis as set forth in *N.Y. Times Co.* and *Gertz* and their progeny, the appellant herein is not a public figure or public official as a matter of law. On remand, the trial court is instructed to proceed under the rule of law pronounced in *Embers Supper Club, Inc. v. Scripps-Howard Broadcasting Co.* (1984), 9 Ohio St. 3d 22, rather than that rule of law set forth in *Dupler*, *supra*.

II

Having found appellant to be a private individual in the realm of First Amendment analysis, our focus turns to the issue of whether the alleged defamatory article expresses constitutionally protected opinion; or whether it contains an assertion of fact which, if false, is not protected by the First Amendment. The courts below held that the article in question expressed the author's "heartfelt" opinion, thus rendering it non-actionable as a matter of law.

The United States Supreme Court stated in *Gertz*, *supra*, at 339-340:

"We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. • • •"

Many courts have interpreted this statement as requiring absolute constitutional protection for statements of opinion in the context of the laws of libel. See, *e.g.*, *Orr v. Argus Press Co.* (C.A. 6, 1978), 586 F. 2d 1108. This court intimated in *Yeager v. Local Union 20* (1983), 6 Ohio St. 3d 369, 372, albeit in the context of a labor dispute, that where language is used which is capable of different meanings, such language constitutes an expression of opin-

ion, not fact, and is protected. Nevertheless, this court has not adopted any specific standard with which to guide courts in determining what constitutes an expression of opinion, and what constitutes an expression of fact.

Some courts have adopted a variation of a "truth or falsity" test in order to distinguish between assertions of fact and assertions of opinion. See, *e.g.*, *Buckley v. Littell* (C.A. 2, 1976), 539 F. 2d 882, certiorari denied (1977), 429 U.S. 1062. Under this approach, the objectionable statements are evaluated to determine whether the statements are capable of being proven false empirically.

Other courts have analyzed the fact/opinion distinction by applying the standard of the "ordinary person"; i.e., whether an ordinary reader of the alleged libelous statements would understand the statements as an expression of the author's opinion, or as statements of existing facts. See, *e.g.*, *Mashburn v. Collin* (La. 1977), 355 So. 2d 879.[2]

While we decline to establish a *per se* rule in determining what constitutes a protected opinion or a potentially redressable assertion of fact, our review of the instant cause leads us to conclude that the lower courts erred in holding that the statements in issue were nothing more than the writer's "heartfelt" opinion. We find that the statements in issue are factual assertions as a matter of law, and are not constitutionally protected as the opinions of the writer. Nothing in the article effectively precautions the reader that the author's statements are merely his considered opinions. The plain import of the author's assertions is that Milkovich, *inter alia*, committed the crime of perjury in a court of law.

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2. For a general exploration of the various tests courts have implemented in examining the fact/opinion dichotomy, see Note, The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule (1984), 72 Geo. L.J. 1817.

In reversing the appellate court on this issue, we are persuaded by the cogent rationale supplied by Judge Friendly in *Cianci v. New Times Publishing Co.* (C.A. 2, 1980), 639 F. 2d 54, at 64:

"It would be destructive of the law of libel if a writer could escape liability for accusations of crime simply by using, explicitly or implicitly, the words 'I think'."

Therefore, based upon the foregoing, we reverse the judgment of the court of appeals, and remand the cause to the trial court for further proceedings consistent with this opinion.

Judgment reversed and cause remanded.

CELEBREZZE, C.J., SWEENEY, C. BROWN and J. P. CELEBREZZE, JJ., concur.

W. BROWN, J., dissents.

LOCHER and HOLMES, JJ., dissent separately.

WILLIAM B. BROWN, J., dissenting. I respectfully dissent on the basis that the alleged defamatory article expresses a constitutionally protected opinion and accordingly cannot be the basis of a defamation action.

There is a growing judicial recognition that pure statements of opinion are absolutely privileged from being the basis for a defamation suit. See, *e.g.*, *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 324. In *Orr v. Argus Press Co.* (C.A. 6, 1978), 586 F. 2d 1108, 1114, the *Gertz* principle regarding a statement of opinion was applied: "It is now established as a matter of constitutional law that a statement of opinion about matters which are publicly known is not defamatory." The underlying rationale is that even erroneous opinion is to be tolerated in order that self-censorship not prevail over robust public debate.

In the instant case, appellant was essentially accused in the article of perjury, *i.e.*, lying under oath. The great weight of authority holds that allegations concerning illegality are not absolutely protected by the First Amendment.

"While the Restatement (Second) of Torts posits an absolute privilege for opinions, it explicitly recognizes that an allegation of criminal behavior is properly the subject of a defamation action. Most courts have not faced the question of whether such accusations should be categorized as facts or opinions. They have acknowledged, nonetheless, either implicitly or explicitly, that such accusations are not absolutely protected under the first amendment and have only the more limited *New York Times* privilege reserved for statements not made in reckless disregard of the truth." Note, Fact and Opinion After *Gertz v. Robert Welch, Inc.*: The Evolution of a Privilege (1981), 34 Rutgers L. Rev. 81, 114-115.

In the instant case, the statements were not made in reckless disregard of the truth. The author disclosed the basis upon which his opinions were formulated. He stated he attended the wrestling match in question and was present at the OHSAA hearing. The writer also indicated he had a recounting of the due process proceedings held in Franklin County from Dr. Meyer, who had also been at the OHSAA hearing. Under these facts, I cannot find that the writer acted in reckless disregard of the truth. Resultantly, in my opinion, this editorial opinion may not form the basis of a defamation suit.

Having determined that the article consituted a constitutionally privileged opinion, it is unnecessary to consider the issue of whether appellant was a public figure.

HOLMES, *J.*, dissenting. In the first instance, it appears to me that the publication with which we are concerned here is an expression of an opinion by the reporter, and not an untruthful statement of fact. As such, the statement is not actionable under First Amendment protection. *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323; *Hotchner v. Castillo-Puche* (C.A.2, 1977), 551 F. 2d 910; and *Orr v. Argus-Press Co.* (C.A.6, 1978), 586 F. 2d 1108.

An opinion can be libelous only if a defamed plaintiff establishes four very limited conditions: (1) the opinion article must imply the existence of facts unknown to the general reader; (2) these implied, unknown facts must not be disclosed in the article; (3) these implied, undisclosed facts must be false; and (4) these implied, undisclosed and false facts must be the basis for the opinions stated in the article. *Orr v. Argus-Press Co., supra; Hotchner v. Castillo-Puche, supra.* The privilege for opinion can be lost only if the article does not disclose the facts underlying the opinions. 3 Restatement of the Law 2d, Torts (1977) 170, Section 566.

In the case before us, the trial court carefully reviewed the subject article and then held that the article fully disclosed the facts upon which its opinions were formulated. In affirming the trial court's decision, the court of appeals held that "[t]he record supports the trial court's analysis. Moreover, the article, as an opinion, disclosed its underlying facts. The writer * * * referred to events and circumstances upon which he based his opinion."

The article plainly refers to at least three distinct but related events upon which the author's personal opinions and editorial conclusions were derived:

(1) The February 9, 1974 wrestling meet between Maple Heights High School and Mentor High School;

(2) the administrative hearings on the wrestling meet conducted by the Ohio High School Athletic Association; and

(3) the proceedings before, and the decision of, the Court of Common Pleas of Franklin County regarding the due process aspects of the OHSAA administrative hearings.

The author further states in the article that he attended, covered and reported upon the wrestling match in question and the administrative hearings before the OHSAA. The article also explains that the opinions expressed regarding appellant's testimony before the Court of Common Pleas of Franklin County were based upon the author's conversation with Dr. Harold Meyer, Commissioner of the OHSAA, who attended the court hearing. Thus, a reader was free to agree or disagree with Diadiun's expressed opinions based upon the facts clearly stated in the article.

Furthermore, it is my view that the lower courts must be affirmed under the facts presented here in that Milkovich could well be considered to be a public figure under the criteria set forth in the recent opinions of the United States Supreme Court. In *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130, the court held that a person's prominence in the sports world could make him a public figure based upon the facts presented in a given case. Similarly, the proof before the trier of the facts in this case established that Milkovich was a public figure within the area of the publication of appellee's newspaper column, and perhaps reasonably beyond such geographic area. By his own admission, Milkovich is one of America's outstanding coaches and a nationally acclaimed sports figure.

His coaching record is unparalleled in Ohio and throughout the country, and he has been honored by civic groups, legislative bodies and numerous sports organizations.[3]

In accordance with the Supreme Court's requirements in *Butts, supra,* the trial court in the case *sub judice* properly ruled, in summary judgment proceedings, that Milkovich is a public figure. Appellant's attainments and prominence as a national sports figure, honored by sports, civic and legislative bodies, with coaching records seemingly unparalleled in Ohio and nationally, unquestionably establish him as a public figure.

In addition, Milkovich, by his own actions, has established himself as a "public figure" under the standards of *Gertz, supra.* In that case, the Supreme Court summarized the law regarding "public figure" status in libel cases by stating that, "[t]hose who, by reason of the notoriety of their achievement or the vigor and success with which they seek the public's attention, are properly classed as public figures * * *." *Id.* at 342.

Based on the foregoing, and construing all of the evidence most favorably in favor of Milkovich at the time of the motion for summary judgment, I conclude that the appellant failed to raise any genuine issue of material fact upon which a jury could find actual malice with any standard of convincing clarity, and therefore the trial court's granting of summary judgment was proper.

Accordingly, I would affirm the judgment of the court of appeals.

LOCHER, J., concurs in the foregoing dissenting opinion.

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3. A list of such accomplishments is found in fn. 1 of the majority opinion.

Judgment and Mandate of the Supreme Court of Ohio
(December 31, 1984)

No. 83-1833

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

MICHAEL MILKOVICH SR.,
Appellant,

vs.

THE NEWS-HERALD *et al.*,
Appellees.

MANDATE

To the Honorable Court of Common Pleas Within and for the County of Lake, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals is reversed and cause remanded for the reasons set forth in the opinion rendered herein.

Supreme Court of Ohio's Order Denying Defendants' Motion for Rehearing
(February 6, 1985)

Case No. 83-1833

THE SUPREME COURT OF OHIO
COLUMBUS

MICHAEL MILKOVICH, SR.,
Appellant,

vs.

NEWS HERALD *et al.*,
Appellees.

REHEARING

It is ordered by the court that rehearing in this case is denied.

United States Supreme Court's Order Denying Defendants' Petition for a Writ of Certiorari
(November 4, 1985)

No. 84-1731. LORAIN JOURNAL CO. ET AL. *v.* MILKOVICH. Sup. Ct. Ohio. Certiorari denied. Reported below: 15 Ohio St. 3d 292, 473 N. E. 2d 1191.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Error and misstatement are inevitable in any scheme of truly free expression and debate. Because punishment of error may induce a cautious and restrained exercise of the freedoms of speech and press, the fruitful exercise of these essential freedoms requires a degree of "breathing space." *NAACP* v. *Button*, 371 U. S. 415, 433 (1963). Accordingly, "we protect some falsehood in order to protect speech that matters." *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 341 (1974); see also *St. Amant* v. *Thompson*, 390 U. S. 727, 732 (1968). The *New York Times* actual malice

standard defines the level of constitutional protection appropriate in the context of defamation of a public official. It rests on our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, [illegible] S. 254, 270 (1964). In *Curtis Publishing Co.* v. *Butts*, [illegible] S. 130 (1967), the *New York Times* standard was extended to statements criticizing "public figures" because we recognized that "'public figures,' like 'public officials,' often play an influential role in ordering society" and that therefore "[o]ur citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'" 388 U. S., at 164 (Warren, C. J., concurring in result). In *Gertz* v. *Robert Welch, Inc.*, *supra*, we limited the applicability of the *New York Times* standard by holding that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." 418 U. S., at 347 (footnote omitted).

In this case, the Ohio Supreme Court found *Gertz* rather than *New York Times* applicable to respondent Milkovich's libel suit against petitioners. Ostensibly, then, the issue presented in this petition is simply the narrow one whether petitioners will be required to pay damages upon a showing of negligence or actual malice. However, by allowing damages to be awarded upon a showing of negligence, thereby diminishing the "breathing space" allowed for free expression in the *New York Times* case, the decision in *Gertz* exacerbated the likelihood of self-censorship with respect to reports concerning "private individuals." See 418 U. S., at 365–368 (BRENNAN, J., dissenting). Consequently, the rules we adopt to determine an individual's status as "public" or "private" powerfully affect the manner in which the press decides what to publish and, more importantly, what not to publish. In finding *New York Times* inapplicable, the Ohio Supreme Court read the "public official" and "public figure" doctrines in an exceptionally narrow way that is sure to restrict expression by the press in Ohio. Its decision is especially unfortunate in that it most affects reporting by local papers about the local controversies that constitute their primary content. Moreover, it is these local papers that are most coerced by the threat of libel damages

since they can least afford the expense of damages awards. I therefore dissent and would grant certiorari in order to review this important constitutional question.

I

On February 9, 1974, a melee occurred at a high school wrestling match between Maple Heights and Mentor High Schools; several wrestlers were injured, four of them requiring treatment at a hospital. The Ohio High School Athletic Association (OHSAA) conducted a hearing into the occurrence and censured Michael Milkovich, the Maple Heights coach and a teacher at the high school, for his conduct in encouraging the brawl. In addition, the OHSAA placed the Maple Heights team on probation for the school year and declared it ineligible to compete in the state wrestling tournament. Ted Diadiun, a sports columnist for the News-Herald of Willoughby, Ohio, attended and reported on both the match and the hearing.

A group of parents and wrestlers subsequently filed suit in Franklin County Common Pleas Court, alleging that the OHSAA had denied the team due process and seeking to reverse the declaration of ineligibility. Milkovich, though not a party to this lawsuit, appeared as a witness for the plaintiffs. On January 7, 1975, the court held that the wrestling team had been denied due process and enjoined the team's suspension.

The next day, Diadiun wrote another column entitled "Maple beat the law with the 'big lie.'" Diadiun, who had not attended the court hearing, based the story on a description of the judicial proceedings given him by an OHSAA Commissioner and on his own recollection of the wrestling match and ensuing OHSAA hearing. After reporting the result of the lawsuit, the column stated "[b]ut there is something much more important involved here than whether Maple was denied due process by the OHSAA":

> "When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator.
>
> "There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way—many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with and ob-

servations of their superiors and peers, from watching actions and reactions.

"Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

"A lesson which, sadly, in view of the events of the past year, is well they learned early.

"It is simply this: If you get in a jam, lie your way out."

Diadiun stated that Milkovich and others had "misrepresented" the occurrences at the OHSAA hearing but that Milkovich's testimony "had enough contradictions and obvious untruths so that the six [OHSAA] board members were able to see through it." Diadiun then asserted that by the time the court hearing was held, Milkovich and a fellow witness "apparently had their version of the incident polished and reconstructed, and the judge apparently believed them." Diadiun opined that anyone who had attended the match "knows in his heart that Milkovich . . . lied at the hearing after . . . having given his solemn oath to tell the truth. But [he] got away with it." The column concluded:

"Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

"I think not."

Milkovich filed a libel action in state court against Diadiun, the News-Herald, and the latter's parent, the Lorain Journal Company (petitioners). The court denied petitioners' motion for summary judgment, but held that Milkovich was a public figure and, as such, was required to meet the standards established in *New York Times*. After five days of trial, at the close of Milkovich's case, petitioners moved for a directed verdict. The court granted this motion, finding that Milkovich's evidence failed to establish actual malice as a matter of law. The Ohio Court of Appeals reversed and remanded. *Milkovich* v. *Lorain Journal Co.*, 65 Ohio App. 2d 143, 416 N. E. 2d 662 (1979). It noted that the Common Pleas Court had accepted Milkovich's testimony, and ruled that this alone constituted sufficient evidence of actual malice to survive a motion for a directed verdict. The Ohio Supreme Court dismissed the appeal as raising no substantial constitutional question. This Court denied certiorari; I dissented. *Lorain Journal Co.* v. *Milkovich*, 449 U. S. 966 (1980).

On remand and before a new judge in the Common Pleas Court, petitioners filed a second motion for summary judgment. The court reaffirmed the earlier holding that Milkovich was a public figure for purposes of the *New York Times* test and granted the motion. The court held that Milkovich had failed to proffer sufficient evidence for a jury to conclude that Diadiun's column was published with actual malice. Alternatively, the court found that the column constituted a privileged expression of opinion. This time the Ohio Court of Appeals affirmed, holding that the law of the case did not bar a second motion for summary judgment and agreeing with both of the trial court's particular holdings.

The Ohio Supreme Court reversed. *Milkovich* v. *News-Herald*, 15 Ohio St. 3d 292, 473 N. E. 2d 1191 (1984). Concluding "upon a careful review of the record" that Milkovich had not waived the right to challenge the earlier determination of his status as a public figure, the court held that Milkovich was neither a "public official" nor a "public figure," and that the contents of the challenged article were facts which, if false, are not protected by the First Amendment. *Id.*, at 294–297, 473 N. E. 2d, at 1193–1196. This petition followed.

II

A

In *New York Times*, we had no occasion "to determine how far down into the lower ranks of government employees the 'public official' designation would extend . . . ." 376 U. S., at 283, n. 23. That question was addressed two Terms later in *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966). Consistent with the premise of *New York Times* that "[c]riticism of those responsible for government operations must be free, lest criticism of government itself be penalized," the Court in *Rosenblatt* held that "[i]t is clear . . . that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs." 383 U. S., at 85. We recognized there, however, that First Amendment protection cannot turn on formalistic tests of how "high" up the ladder a particular government employee stands. Rather, we determined, the focus must be on the nature of the public employee's function and the public's particular concern with his work. Accordingly, we held:

> "Where a position in government has such apparent importance that the public has *an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees*, . . . the *New York Times* malice standards apply." *Id.*, at 86 (emphasis added).

In *Rosenblatt* itself, we found this standard satisfied with respect to Baer, a supervisor of a county ski resort employed by and responsible to county commissioners.

The Ohio court apparently read the language in *Rosenblatt* referring to government employees having "substantial responsibility for or control over the conduct of government affairs" as restricting the public official designation to officials who set governmental policy. This interpretation led it to conclude that finding a public employee like Milkovich to be a "public official" for purposes of defamation law "would unduly exaggerate the 'public official' designation beyond its original intendment." 15 Ohio St. 3d, at 297, 473 N. E. 2d, at 1195–1196.

The Ohio court has seriously misapprehended our decision in *Rosenblatt*. Indeed, the status of a public school teacher as a "public official" for purposes of applying the *New York Times* rule follows *a fortiori* from the reasoning of the Court in *Rosenblatt*. As this Court noted in holding that the Equal Protection Clause does not bar a State from excluding aliens from teaching positions in the public schools, "public school teachers may be regarded as performing a task 'that go[es] to the heart of representative government.'" *Ambach* v. *Norwick*, 441 U. S. 68, 75–76 (1979) (quoting *Sugarman* v. *Dougall*, 413 U. S. 634, 647 (1973)). We have repeatedly recognized public schools as the Nation's most important institution "in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." 441 U. S., at 76–77. See also *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 29–30 (1973); *Wisconsin* v. *Yoder*, 406 U. S. 205, 213 (1972); *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954). The public school teacher is unquestionably the central figure in this institution:

> "Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way course material is communicated to students. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy." *Ambach*, *supra*, at 78–79 (footnotes omitted).[1]

"[T]eachers . . . possess a high degree of responsibility and discretion in the fulfillment of a basic governmental obligation," *Bernal* v. *Fainter*, 467 U. S. 216, 220 (1984),[2] and it is self-evident that "the public has an independent interest in the qualifications and performance" of those who teach in the public high schools that goes "beyond the general public interest in the qualifications and performance of all government employees," *Rosenblatt*, *supra*, at 86.[3] Public school teachers thus fall squarely

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[1] JUSTICE BLACKMUN's dissent in *Ambach*, which I joined, expressed identical sentiments. See 441 U. S., at 88 ("One may speak proudly of the role model of the teacher, of his ability to mold young minds, of his inculcating force as to national ideals, and of his profound influence in the impartation of our society's values").

[2] See also *Board of Education* v. *Pico*, 457 U. S. 853, 864 (1982) (plurality opinion); *Cabell* v. *Chavez-Salido*, 454 U. S. 432, 457, n. 8 (1982); *Zykan* v. *Warsaw Community School Corporation*, 631 F. 2d 1300, 1307 (CA7 1980).

[3] This perfectly obvious conclusion has led at least one other court to reach a conclusion directly contrary to that of the Ohio Supreme Court. See *Johnston* v. *Corinthian Television Corp.*, 583 P. 2d 1101 (Okla. 1978) (grade school wrestling coach is "public official"). On the other hand, the state courts are in general disarray over the application of the *New York Times* standard to various other types of public employees. See Annot., Libel and Slander: Who is a Public Official or Otherwise Within the Federal Constitutional Rule

within the rationale of *New York Times* and *Rosenblatt*. Moreover, Diadiun's column challenged Milkovich's qualifications to teach young students in light of his conduct in connection with the Maple Heights/Mentor High School incident. It is precisely this type of discussion that *New York Times* and its progeny seek to protect.

B

The Ohio Supreme Court also held that Milkovich was not a "public figure" within the meaning of our decisions. It concluded that this Court has "retreated" from prior holdings and "redefined" public figure status to include only two narrowly defined classes of individuals. 15 Ohio St. 3d, at 294–297, 473 N. E. 2d, at 1193–1195. Milkovich was found to fit in neither of these categories. *Ibid.* Here too, the state court misreads our decisions.

Our first encounter with the application of the *New York Times* test to nongovernment officials came in *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967). *Butts* actually decided two separate cases that were consolidated for review. In the first case, Butts, the athletic director at the University of Georgia[4] and "a well-known and respected figure in coaching ranks," *id.*, at 136, filed a libel action after the Saturday Evening Post published an article accusing Butts of having conspired to fix a football game with the University of Alabama. In the second case, Walker, a retired career Army officer who was prominent in the local community, sued the Associated Press after it filed a news dispatch giving an eyewitness account of a riot that erupted at the University of Mississippi when federal officers tried to enforce a court decree ordering the enrollment of James Meredith, a black, as a student at the University. The report stated that Walker had taken command of the violent crowd and personally had led a charge against federal marshals. Although the Court in *Butts* failed to reach a consensus on the standard of liability in suits brought by "public figures," seven Members of the Court agreed that both Butts and

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Requiring Public Officials to Show Actual Malice, 19 A. L. R. 3d 1361 (1968 and 1985 Supp.). I would also grant certiorari to clarify the law in this regard.

[4] Although the University of Georgia was a state university, Butts was employed by the Georgia Athletic Association, a private corporation, rather than by the State itself. His case thus did not raise the issue whether he was a "public official" for purposes of the *New York Times* test. See *Butts*, 388 U. S., at 135, and n. 2.

Walker occupied this status.[4] Justice Harlan explained in his plurality opinion:

> "[B]oth Butts and Walker commanded a substantial amount of independent public interest at the time of the publications; both, in our opinion, would have been labeled 'public figures' under ordinary tort rules. . . . Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy, but both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements." *Id.*, at 154–155.

As Justice Harlan's opinion indicates, the two cases considered in *Butts* exemplify alternative ways in which an individual may become a "public figure."[5] Our subsequent cases have elaborated on this framework; we have held that "[i]n some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts," while, "[m]ore commonly, an individual voluntarily injects himself or is drawn into a particular controversy and thereby becomes a public figure for a limited range of issues." *Gertz*, 418 U. S., at 351; see also, *Time, Inc.* v. *Firestone*, 424 U. S. 448, 453 (1976); *Hutchinson* v. *Proxmire*, 443 U. S. 111, 134 (1979); *Wolston* v. *Reader's*

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[4] Justices Black and Douglas found it unnecessary to reach the issue consistent with their views that the First Amendment completely prohibits damages for libel. *Id.*, at 170 (Black, J., joined by Douglas, J., concurring in result in Walker's case and dissenting in Butts' case); see also *New York Times*, 376 U. S., at 293 (Black, J., concurring).

[5] Like Butts and Walker, Milkovich would be labeled a "public figure" under ordinary tort rules. See W. Prosser, Law of Torts § 118, pp. 823–824 (4th ed. 1971); cf. *Stryker* v. *Republic Pictures Corp.*, 108 Cal. App. 2d 191, 238 P. 2d 670 (1951); *Molony* v. *Boy Comics Publishers*, 277 App. Div. 166, 98 N. Y. S. 2d 119 (1950); *Wilson* v. *Brown*, 189 Misc. 79, 73 N. Y. S. 2d 587 (1947). Indeed, since in my opinion the scope of the constitutional privilege exceeds that of the privilege recognized at common law for reports about public figures, this fact alone should be sufficient to conclude that Milkovich is a "public figure." However, our subsequent decisions have treated the constitutional privilege without reference to the common-law privilege, *e. g.*, *Time, Inc.* v. *Firestone*, 424 U. S. 448, 453 (1976); *Wolston* v. *Reader's Digest Assn., Inc.*, 443 U. S. 157, 165–169 (1979), and I therefore discuss Milkovich's status under our decisions without reference to the common law.

Digest Assn., Inc., 443 U. S. 157, 164 (1979). However, the ultimate touchstone is always whether an individual has "assumed [a] rol[e] of especial prominence in the affairs of society [that] invite[s] attention and comment." *Gertz*, *supra*, at 345. These categories are merely descriptive; they are not, as the Ohio Supreme Court assumed, rigid, technical standards.

Petitioners spend most of their efforts attempting to analogize their case to that of Butts, and, indeed, the analogy is a strong one.[1] A better argument can be made, however, that Milkovich is a "public figure," like Walker, for purposes of this particular public controversy. Under this prong of "public figure" analysis, an individual who "voluntarily injects himself or is drawn into a particular public controversy" becomes a public figure with respect to public discussion of that controversy. *Gertz*, *supra*, at 351. Walker, for example, was deemed to have "thrus[t] his personality into the 'vortex' of an important public controversy" by allegedly encouraging a riot. Milkovich's conduct was remarkably similar to Walker's—the allegedly libelous publication was inspired by a brawl that resulted in injuries to a number of students;

[1] Like Butts, Milkovich is "a well-known and respected figure in coaching ranks." Indeed, he is unquestionably one of America's outstanding coaches. No other wrestling coach in America has achieved a record even close to his, a fact that has been recognized by numerous organizations. He has received the National Coach of the Year Award, the National Council of High School Coaches Award, the Scholastic Wrestling News National Achievement Award, a United States Wrestling Federation Award, and numerous other gifts, proclamations, and awards. He was inducted into the National Helms Hall of Fame and the Ohio Coaches Hall of Fame and received the Kent State University Hall of Fame Award. He has been cited in the Congressional Record and in the records of both the Ohio Senate and House of Representatives. He was similarly honored by the city of Cleveland and by his own city of Maple Heights, which celebrated "Mike Milkovich Day." He is a much sought after speaker by coaches' associations throughout the United States and conducts wrestling clinics across the country under the aegis of various state and coaches' organizations. See *Milkovich* v. *News-Herald*, 15 Ohio St. 3d 292, 296, and n. 1, 473 N. E. 2d 1191, 1194, and n. 1 (1984). Nor will it do simply to dismiss Milkovich's achievements as merely those of a high school coach. To be sure, as a general matter collegiate athletics obtains wider exposure than high school athletics. But with the exception of a few rather flamboyant figures who gain national exposure, most coaches—like Butts—are unknown outside sports' circles and the local community. Milkovich is probably as well known both locally and in the wrestling community as was Butts in his respective circles.

Milkovich was alleged to have incited the fracas by egging on the crowd. While this fight did not compare in size or ferocity to the riots in which Walker participated at the University of Mississippi, it was a public controversy of concern to residents of the local community, as important to them as larger events are to the Nation. Significantly, it was only in this community that the challenged article was circulated. See *Rosenblatt* v. *Baer*, 383 U. S., at 83 ("The subject matter may have been only of local interest, but at least here, where publication was addressed primarily to the interested community, that fact is constitutionally irrelevant"). The conclusion that Milkovich was a limited purpose public figure therefore seems quite straightforward.

The Ohio Supreme Court nevertheless concluded that Milkovich could not be classed a "public figure" because he "never thrust himself to the forefront of [the] controversy in order to influence its decision." 15 Ohio St. 3d, at 297, 473 N. E. 2d, at 1195. However, the *New York Times* standard is not limited to discussion of individuals who deliberately seek to involve themselves in public issues to influence their outcome. Our decisions in this area rest at bottom on the need to protect public discussion about matters of legitimate public concern. See *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749, 755–761 (1985) (opinion of POWELL, J., joined by REHNQUIST and O'CONNOR, JJ.); *id.*, at 763–764 (opinion of BURGER, C. J.); *id.*, at 777–789 (opinion of BRENNAN, J., joined by MARSHALL, BLACKMUN, and STEVENS, JJ.). Although not every person connected to a public controversy is a "public figure," *Gertz*, *supra*, the *New York Times* protections do, and necessarily must, encompass the major figures around which a controversy rages. See *Wolston* v. *Reader's Digest Assn.*, *supra*, at 167; see also *Gertz*, *supra*, at 351 (public figure is one who "voluntarily injects himself *or is drawn* into a particular public controversy" (emphasis added)).[4]

[4] In *Wolston*, we held that although an individual's failure to appear before a grand jury investigating Soviet espionage was newsworthy, "[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." 443 U. S., at 167. Rather, we emphasized, "a court must focus on the 'nature and extent of an individual's participation in the particular controversy giving rise to the defamation.'" *Ibid.* (quoting *Gertz*, 418 U. S., at 352). Because it was "clear that [Wolston] played only a minor role in whatever public controversy there may have been concerning the investigation of Soviet espio-

We only recently acknowledged the "compelling" nature of the local interest in preventing violence and preserving discipline in the Nation's high schools. *New Jersey* v. *T. L. O.*, 469 U. S. 325, 350 (1985). A large fight between the students of two rival schools quite legitimately raises serious concerns for the entire community, particularly when, as here, it results in injury to students.[9] The present controversy centered primarily around the conduct of one man—Milkovich—in encouraging the fight; that conduct allegedly resulted in an OHSAA hearing, his censure by that association, and the disqualification of his team from eligibility in the state wrestling tournament.[10] To say that Milkovich nevertheless was not a public figure for purposes of discussion about the controversy is simply nonsense.

III

The "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times*, 376 U. S., at 270, applies as much to debate in the local media about local issues as it does to debate in the national media over national issues. This Court's *obligation* to preserve the precious freedoms established in the First Amendment is every bit as strong in the context of a local paper's report of an incident at a local high school as it is in the context of an advertisment in one of the Nation's largest newspapers supporting the struggle for racial freedom in the South. Because the decision below will stifle public debate about important local issues, I respectfully dissent.

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nage," he was held not to be a public figure. 443 U. S., at 167. Milkovich, on the other hand, was clearly the major player in this public controversy.

[9] At one point in its opinion, the Ohio Supreme Court cited our holding in *Time, Inc.* v. *Firestone*, 424 U. S. 448 (1976), that Mrs. Firestone's divorce was "not the sort of 'public controversy' envisioned in *Gertz*." 15 Ohio St. 3d, at 296, 473 N. E. 2d, at 1194. The nature of the controversy here is completely different. This was not a private matter of public concern merely to gossips. Rather, the controversy in which Milkovich was involved was of immediate importance to parents and others in the community.

[10] These facts distinguish this case from *Hutchinson* v. *Proxmire*, 443 U. S. 111 (1979). In *Hutchinson*, a hitherto unknown research scientist was allegedly libeled when Senator Proxmire awarded his Government sponsor a "Golden Fleece of the Month Award" to publicize what the Senator perceived to be the most egregious examples of wasteful Government spending. Proxmire argued that Hutchinson became a limited purpose public figure as a result of the publicity surrounding his being awarded a "Golden Fleece." We rejected this argument on the ground that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Id.*, at 135. The controversy surrounding the fight at the high school, on the other hand, was not created by Diadiun's column. The event itself created a stir, leading to a hearing, censure of Milkovich, and disqualification of his team. Diadiun's column merely reported his view, as an observer of the initial fight, that such a man ought not be allowed to teach young students.

Judgment Entry of the Court of Common Pleas of Lake County, Ohio Granting Defendants' Motion for a Summary Judgment
(October 6, 1987)

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR., Plaintiff,	)	CASE NO. 75 CIV 0301
-vs-	)	JUDGMENT ENTRY
THE NEWS HERALD, et al. Defendants.	)	October 6, 1987

Defendants The Lorain Journal Company, aka The News Herald, and I. Theodore Diadiun's joint motion for summary judgment is hereby granted.

IT IS SO ORDERED.

/S/ James W. Jackson
Judge of the Court of Common Pleas

Copies:

Richard D. Panza, Esq.
Brent L. English, Esq.
John J. Hurley, Esq.

Opinion of the Ohio Court of Appeals for the Eleventh Appellate District, Lake County, Ohio
(February 6, 1989)

COURT OF APPEALS
ELEVENTH DISTRICT
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR.,
Plaintiff-Appellant,

-vs-

THE NEWS-HERALD, et al.,
Defendents-Appellees.

JUDGES

HON. DONALD R. FORD, P.J.
HON. JUDITH A. CHRISTLEY, J.
HON. SAUL G. STILLMAN, J.,
Ret., Eighth Appellate Dist.
sitting by assignment for
HON. ROBERT E. COOK.

Case No. 13-009

OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas Case No. 75 CIV 0301

JUDGMENT: Affirmed.

ATTY. BRENT L. ENGLISH
140 Public Square
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Cleveland, OH 44114
(For Plaintiff-Appellant)

ATTY. RICHARD D. PANZA
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(For Defendants-Appellees)

STILLMAN, J.

On February 9, 1974, Maple Heights High School had a wrestling meet with Mentor High School. Michael Milkovich, now retired, was then the head wrestling coach of Maple Heights. During the meet, a controversial call was made against Maple Heights. As a result, a fight broke out involving spectators and team members from both squads resulting from the disqualification of a Maple Heights wrestler. Several people were injured in the disturbance.

On February 28, 1974, the Ohio High School Athletic Association (OHSAA) held a hearing on the matter at which both H. Don Scott, then Superintendent of Maple Heights Public Schools, and Milkovich testified. Following the hearing, OHSAA placed the entire Maple Heights team on probation for one year and declared the team ineligible for the 1975 state tournament. OHSAA also censored Milkovich for his actions during this match.

Thereafter, several parents and affected wrestlers sued OHSAA in the Court of Common Pleas of Franklin County for a restraining order contending they were denied due process. Scott, Milkovich and Dr. Harold A. Meyer, the commissioner of OHSAA, all testified at this proceeding. The court reversed the probation and ineligibility orders on grounds of denial of due process.

The day after the trial court's decision, the News-Herald in Willoughby, Ohio published a column written by reporter J. Theodore Diadiun on its sports page. The column was titled, "Maple beat the law with the 'big lie,'" and included the words "TD Says" beneath the title. The carryover page was entitled "*** Diadiun says Maple told a lie."

The article alleged, *inter alia*, that Milkovich and Scott "*** lied at the hearing after each having given his solemn oath to tell the truth." The record indicates that Diadiun did attend the wrestling match and OHSAA's hearing, but was not present at the Franklin County judicial proceedings. However, the article stated that Diadiun had discussed the hearing with Dr. Meyer.

Both Milkovich and Scott commenced a defamation action in the Court of Common Pleas of Lake County against the News-Herald, its parent company, Lorain Journal Company, and Diadiun. Milkovich, in his original and amended complaints, alleged that the following passages of the Diadiun article were actionable and libelous.

> "Maple beat the law with the 'big lie'
>
> "***
>
> "*** a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.
>
> "A lesson which, sadly, in view of the events of the past year, is well they learned early.
>
> "It is simply this: If you get in a jam, lie your way out.
>
> "If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.
>
> "The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools, H. Donald Scott ***.
>
> "***
>
> "Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.
>
> "But they got away with it.
>
> "Is this the kind of lesson we want our young people learning from their high school administrators and coaches?
>
> "I think not."

Prior to trial, the trial court determined that the appellant was a public figure, and as such, would be required to prove "actual malice" on the part of the News-Herald, et al., under *New York Times Co.* v. *Sullivan* (1964), 376 U.S. 254.

A jury trial was held, but a directed verdict was entered against Milkovich. Upon appeal, the court of appeals reversed and remanded. The Ohio Supreme Court overruled the New-Herald's motion to certify the record and the United States Supreme Court denied certiorari.

Upon remand, the News-Herald filed a motion for summary judgment contending that the alleged libel was protected because it amounted to an expression of opinion. The trial court agreed and granted summary judgment in favor of the News-Herald, et al.

Upon a second appeal to the court of appeals, the trial court's decision was affirmed. On December 31, 1984, the Ohio Supreme Court overruled the appeals court. The Ohio Supreme Court held, *inter alia*, that the Diadiun article was not constitutionally protected material. The case was reversed and remanded.

While the Milkovich case was pending, H. Don Scott had also filed a suit in libel. The trial court dismissed the Scott suit on summary judgment. The Scott trial court found that the article was constitutionally protected opinion, that Scott was a "public official," and that he had failed to prove "actual malice." The court of appeals affirmed the judgment of the Scott trial court. On August 5, 1986, the Scott suit was before the Ohio Supreme Court on a motion to certify. The Scott suit was in conflict with *Milkovich* v. *News-Herald* (1984), 15 Ohio St. 3d 292. The Ohio Supreme Court affirmed the court of appeals. They held, *inter alia*, that the article in question was opinion.

On remand for the third time to the Court of Common Pleas of Lake County, Ohio, the News-Herald, et al., moved for summary judgment. Their motion claimed that the case of *Scott* v. *News-Herald* (1986), 25 Ohio St. 3d 243, established, for the purpose of this case, that the article in question was cloaked with an absolute constitutionally-based First

Amendment privilege. The News-Herald's motion for summary judgment had attached a memorandum filed January 20, 1987. The attached memorandum basically stated that the case of *Scott* v. *News-Herald*, *supra*, was now the law and should control in the instant cause. Nothing else was attached to the motion.

On January 30, 1987, a "supplemental memorandum in support of motion for summary judgment" was filed. Attached was an affidavit of Ted Diadiun which stated that a middle school in Maple Heights School District had been named "Milkovich Middle School" after the wrestling coach. On April 8, 1987, a "motion of defendants for summary judgment, instanter" was filed. Nothing was attached; however, the motion stated that it incorporated "the interrogatories and depositions filed with the court and all of the affidavits and exhibits annexed to defendant's prior Motions for Summary Judgment filed with the Court on November 8, 1976 and April 17, 1981." On July 15, 1987, a memorandum in opposition to summary judgment was filed. There were no attachments. A reply memorandum, with no attachments, was filed August 10, 1987.

The trial court granted the summary judgment motion for the News-Herald, et al. Milkovich has timely appealed the case to this court, listing four assignments of error:

> "1. The trial court erred in granting a summary judgment since the appellees are not protected by a blanket First Amendment privilege as the offending article contained assertions of fact and not mere opinions.
>
> "2. The law of the case doctrine operates to require the trial court to follow the mandate of the Supreme Court of Ohio in *Milkovich* v. *The News-Herald*, (sic) 15 Ohio St. 3d 292 (1984).
>
> "3. Summary judgment was inappropriate in this case because the existence of privilege depended on resolution of disputed factual contentions and thus could not be made as a matter of law by the court based on a summary judgment motion.

> "4. Assuming that appellees are not protected for a First Amendment-based privilege to defame, summary judgment should not have been granted because there are genuine issues of fact in dispute as to negligence and actual malice."

The assigned errors are without merit.

Milkovich contends that the trial court erred in granting summary judgment. He asserts four assignments of error, all of which relate to the trial court's granting of summary judgment. Milkovich's first contention is that the article in the News-Herald was not protected by the First Amendment because it contained assertions of fact and not opinion. His second contention is that the trial court should have followed the case of *Milkovich* v. *News-Herald* (1984), 15 Ohio St. 3d 292. His third contention is that there remains a geniune issue as to whether the statements were assertions of fact or opinion. His final contention is that there continues to be genuine issues of fact in dispute as to whether there was actual malice on the part of the News- Herald, et al.

Milkovich's four assignements of error are basically only one assignment of error, to-wit: The trial court erred in granting appellee's motion for summary judgment.

In *Temple* v. *Wean United, Inc.* (1977), 50 Ohio St. 2d 317, the Ohio Supreme Court, at page 327, stated:

> "Civ. R. 56(c) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party."

Civ. R. 56 establishes summary judgment as a procedural device designed to terminate litigation and to avoid a formal trial where there is nothing to try. *Norris* v. *Ohio Std. Oil Co.* (1982), 70 Ohio St. 2d 1. The

burden of showing that no genuine issue exists as to any material fact falls upon the party requesting a summary judgment. When a motion for summary judgment is made and supported, an adverse party must counter with affidavits or other evidentiary material provided for in Civ. R. 56(c) to create a genuine issue as to any material fact. *Harless* v. *Willis Day Warehousing Co.* (1978), 54 Ohio St. 2d 64. The inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. *Williams* v. *First United Church of Christ* (1974), 37 Ohio St. 2d 150.

Milkovich's first three contentions can be consolidated into one. He is asserting that there remains a factual dispute as to whether the article is an assertion of fact or opinion. Milkovich further contends that this court should follow the reasoning as set forth in *Milkovich* v. *News-Herald*, *supra*.

In the instant cause, it has been decided, as a matter of law, that the article in question is protected opinion.

> "*** In *Milkovich* v. *News-Herald*, *supra*, this court recently dealt with the same article we examine today. ***[W]e now overrule the holding in *Milkovich* with respect to the characterization of the article. We find the article to be an opinion, protected by Section 11, Article I of the Ohio Constitution as a proper exercise of freedom of the press.
>
> "The federal constitution has been construed to protect published opinions ever since the United States Supreme Court's opinion in *Gertz* v. *Robert Welch, Inc.* (1974), 418 U.S. 323, ***" *Scott* v. *News-Herald*, *supra*, at 244.

Milkovich asserts that the trial court was bound to follow the mandate of the Supreme Court as set forth in *Milkovich* v. *News-Herald*, *supra*. A trial court does not have the discretion to disregard a mandate of a superior court *unless* there is an extraordinary circumstance *"such as an intervening decision by the Supreme Court."* (Emphasis added.) *Nolan* v. *Nolan* (1984), 11 Ohio St. 3d 1. Secondly, when there is a conflict between cases, the court of appeals is bound by the Supreme Court's last decision on the question involved, regardless of its previous decision. *Mutual Life Ins. Co. of Baltimore* v. *Connell* (1931), 43 Ohio App. 415. See also, generally, 23 Ohio Jurisprudence 3d (1980) 150, Courts and Judges, Section 518.

In conclusion, it has been decided, as a matter of law, that the article in question was constitutionally protected opinion. The court of appeals, as a lower court, is bound by the Supreme Court's decision on the matter. As such, there was no genuine issue of material fact remaining nor was there any factual dispute as to whether the article was opinion or assertion of fact. Accordingly, the first, second and third assignments of error are without merit.

In his fourth assignment of error, Milkovich is contending that there is a "genuine issue of fact" in dispute as to negligence and actual malice. He asserts that the article and its assertions are not privileged and as such there remained a material issue of fact as to whether the News-Herald acted negligently or with "actual malice in publishing the article.

In the instant cause, counsel's contention is erroneous. The article which has been previously considered in *Scott* v. *News-Herald* (1986), 25 Ohio St. 3d 243, has already been found to be constitutionally protected opinion.

> "Expressions of opinion are generally accorded absolute immunity from liability under the First Amendment. *Trump* v. *Chicago Tribune Co.* (D.N.Y. 1985), 616 F. Supp. 1434, 1435; *Gertz* v. *Robert Welch, Inc.*, *supra*, at 339; *Chaves* v. *Johnson* (Va. 1985), 335 S.E. 2d 97, 102. ***" *Id.* at 250.

As a matter of law, the instant cause does not present any material issue of fact as to negligence or "actual malice." Diadiun's article is opinion and as such, the News-Herald and Diadiun are accorded absolute immunity from liability. The fourth assignment of error is without merit, and accordingly, we affirm the judgment of the trial court.

Judgment afirmed.

/S/ JUDGE SAUL G. STILLMAN,
Ret., sitting by assignment.

FORD, P.J., concurs with Concurring Opinion,
CHRISTLEY, J., concurs.

COURT OF APPEALS
ELEVENTH DISTRICT
LAKE COUNTY, OHIO

JUDGES

HON. DONALD R. FORD, P.J.
HON. JUDITH A. CHRISTLEY, J.,
HON. SAUL G. STILLMAN, J.,
Ret., Eighth Appellate Dist.,
sitting by assignment.

MICHAEL MILKOVICH, SR.,
Plaintiff-Appellant,

-vs-

THE NEWS-HERALD, et al.,
Defendants-Appellees.

CASE NO. 13-009

CONCURRING OPINION

FORD, P.J.,

Although I agree with the majority that the *Scott* case interdicted the law of *Milkovich* as it pertained to the issue of whether the subject article in question was in the nature of fact or opinion, this writer is not persuaded that *Scott* affected the conclusion by the *Milkovich* court that the appellant here was to be considered a private figure.

The appellee asserts that the holding of *Anderson* v. *Liberty Lobby, Inc.* (1986), 447 U.S. 242, should somehow apply to the present appeal. *Anderson, supra,* involved the nature of a trial court's inquiry in a summary judgment exercise where the *New York Times* "clear and convincing" evidence requirement applied. The court in *Anderson* held that:

> "[W]here the factual dispute concerns actual malice, clearly a material issue in a New York Times case, the appropriate summary judgment question will be whether the exidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Id.* at 255-256.

However, in view of the Ohio State Supreme Court's ruling in *Lansdowne* v. *Beacon Journal Pub. Co.* (1987), 32 Ohio St. 3d 176, it would appear inferentially that the fact that an individual would be determined to be a private person rather than a public figure or official would not alter the requirements for a nonmoving party in a summary judgment exercise in a libel case.

The metamorphosis of libel in Ohio has insulated the concerns for the chilling effect by moving to equatorial splendor for the Fourth Estate. The effect of the *Scott* and *Lansdowne* decisions in Ohio is to have effectively muted this traditional cause of action.

While a free press is fundamental to a free and democratic society, the quest for a more sensible set of criteria to balance the dignity and privacy of the individual with that of First Amendment guarantees to insure the guardian character of the press is a quest that it is hoped will achieve a greater harmony and clarity in the future.

/S/ PRESIDING JUDGE DONALD R. FORD

Judgment Entry of the Ohio Court of Appeals for the Eleventh Appellate District, Lake County, Ohio
(February 6, 1989)

STATE OF OHIO
COUNTY OF LAKE

THE COURT OF APPEALS
ELEVENTH DISTRICT

MICHAEL MILKOVICH, SR.,
Plaintiff-Appellant,

-vs-

THE NEWS HERALD, et al.
Defendants-Appellees.

JUDGMENT ENTRY

CASE NO. 13-009

For the reasons stated in the Opinion of this Court, each assignment of error is overruled, and it is the judgment and order of this Court that the judgment of the trial court is affirmed.

/S/ JUDGE SAUL G. STILLMAN,
Ret., sitting by assignment.
FOR THE COURT

FORD, P.J., concurs with Concurring Opinion,
CHRISTLEY, J., concurs.

Supreme Court of Ohio's Order Denying Plaintiff's Motion to Certify the Record
(June 7, 1989)

The Supreme Court of Ohio

1989 TERM

To wit: June 7, 1989

Michael Milkovich, Sr.,
Appellant.

v.

News Herald et al.,
Appellees.

Case No. 89-547

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Lake County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by Brent L. English.
(Court of Appeals No. 13009)

/S/ THOMAS J. MOYER
Chief Justice

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR., *Plaintiff,*	)	CASE NO. 75CV0301
	)	JUDGE JOHN CLAIR
-vs-	)	
	)	
THE NEWS-HERALD, *et al.* *Defendants.*	)	MOTION FOR SUMMARY JUDGMENT
	)	

Now comes The News-Herald, The Lorain Journal Co., and I. Theodore Diadiun, aka Ted Diadiun, Defendants who jointly and severally move this Court for the following Orders in this cause:

1. An Order, pursuant to Rule 56B, Ohio Rules of Civil Procedure, finding that the Plaintiff herein is a public figure and a public official within the meaning of the decisions of the United States Supreme Court in the cases of *New York Times Co. v. Sullivan*, 376 U.S. 254; *Curtis v. Butts*, 388 U.S. 130 and *Time Inc. v. Firestone*, 96 S. Ct. 958.

2. An Order, pursuant to Rule 56B, Ohio Rules of Civil Procedure and pursuant to the decision of the United States Supreme Court in the case of *Gertz v. Welch*, 418 U.S. 323(2), striking from the Complaint the Plaintiff's request for punitive and exemplary damages, and finding that there is no justiciable issue of knowledge of falsity or reckless disregard of trust in this case.

3. An Order, pursuant to Rule 56B, Ohio Rules of Civil Procedure and pursuant to the decree of the United States Supreme Court in the case of *New York Times Co. v. Sullivan*, 376 U.S. 254, decreeing a Summary Judgment in the Defendants' favor and dismissing this action on the grounds and for the reason that there is no genuine issue here as to any material fact, and that each Defendant is entitled to judgment as a matter of law.

This motion is based upon the depositions of Michael Milkovich and H. Don Scott, heretofore filed with this Court in this cause, and upon the affidavits of Theodore Diadiun, Harry Horvitz, James Collins, John W. Saffell, William G. Wickens, Peggy O. Hanrahan, Frank Domokos, B.J. Klepek and James Schonauer with annexed exhibits.

David L. Herzer /s/
David L. Herzer
WICKENS & HERZER CO.
763 Broadway
212 Ohio Edison Building
Lorain, Ohio 44052
Phone: (216) 244-5268

John I. Hurley, Jr. /s/
John I. Hurley
NELSON, SWEET & HURLEY
66 Mentor Avenue
Painesville, Ohio 44077
Phone: (216) 357-5558

William G. Wickens /s/
William G. Wickens
WICKENS & HERZER CO.
763 Broadway
212 Ohio Edison Building
Lorain, Ohio 44052
Phone: (216) 244-5268

PROOF OF SERVICE

This will certify that a true copy of the foregoing Motion, with attached Affidavits and Brief, was served upon the Plaintiff by mailing same, ordinary mail, postage paid, to his attorney, Nathan Simon of Mandanici, Domiano, Nuccio and Simon at 1328 Standard Building, Cleveland, Ohio 44113, this 5th day of November, 1976.

William G. Wickens /s/
William G. Wickens

David L. Herzer /s/
David L. Herzer

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR., *Plaintiff,*	)	CASE NO. 75 CV 0301
	)	JUDGE JOHN CLAIR
-vs-	)	
	)	
THE NEWS-HERALD, *et al.* *Defendants.*	)	
	)	

SELECTED EXHIBITS TO MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANTS ON NOVEMBER 8, 1976

EXHIBIT A

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

PATRICK J. BARRETT, *et al.*, *Plaintiff,*	)	CASE NO. 74CV-09-1300
	)	
-vs-	)	
	)	
OHIO HIGH SCHOOL ATHLETIC ASSOCIATION, Defendant.	)	
	)	
	)	

EXTRACT OF TESTIMONY

of Mr. Mike Milkovich from the notes and comparison to transcript from said notes as recorded during the hearing of this matter before the Honorable Paul W. Martin, Judge, beginning on November 8, 1974.

APPEARANCES:

Mandanici, Domiano, Nuccio & Simon, Attorneys at Law, 1328 Northern Ohio Bank Building, Cleveland, Ohio, by Mr. Nathan Simon and Mr. Michael J. Occhionero, of Counsel,

On behalf of the Plaintiffs.

Henry Maser and Carlisle O. Dollings, Attorneys at Law, One Livingston Avenue, Columbus, Ohio,

On behalf of the Defendant.

* * * * *

hand across the back of the head and the referee penalized and justifiably so the Maple Heights boy.

The Mentor boy stood up and the — I think the coach called for time out and told the boy to lay down.

Then you could hear a sort of rumbling in the fans, a reaction from the fans. Then, I think, I waited for about two minutes because the rule book says three minutes for an injury. I went out to check on the boy.

The coach say, "He is not going to wrestle. My boy is hurt."

I said, "Fine." I says, "Take your 6 points and let's bring on the next match" and I was outside of th .0-foot circle and I montioned for the 165 pound class to come on

Then I looked over my right shoulder and I saw an altercation going on at the Mentor bench.

Q. When you saw this altercation taking place, what did you do, if anything?

A. I walked over. You see, some people were getting out of the stands. I said, "Go back and sit down." It seemed to me that it lasted maybe five, ten seconds, no longer. We pushed the people back and they sat down. The referee left and then the superintendent and the —

Q. Which superintendent?

A. Don Scott, our superintendent and the athletic director met with the coach, the — I believe the athletic director from Mentor and said that I should go on the PA System and say that if we had anymore of this that we would clear the gym and wrestle without any fans.

Q. Mr. Milkovich, where were you standing when this altercation as such occurred?

A. I was standing in front of my bench.

Q. Describe to the Court where your bench is in relation to where the Mentor coach was and where the altercation took place?

A. The bench was probably — our bench is separated by about six or seven feet. I'm not sure. There is a separation. We have benches that we use in football and we move them on to the corner of the wrestling mat and the wrestling mat is about 42 by 40.

Q. Assume this is the wrestling room. If you will just give the Court some idea what is happening — this is the wrestling mat itself, here. Where is the Maple Heights bench in relation to this as being the room?

A. The Maple Heights mat would be right here or the match would be going on there. The contestants of Maple Heights were here and the Mentor team would be in the position of this bench right here.

Q. So the Mentor team was here?

A. Yes.

Q. And the Maple Heights team, where were they in relation —

A. Right here.

Q. Over there. That position.

A. I stood in front of the bench.

Q. The wrestling mat is out there?

A. Yes.

Q. Where were you standing when this altercation took place?

A. I must have been about 10, 15 feet away from my bench, but in front of it.

Q. This is your bench? Where would that be? Over there?

A. No, sir. I would be standing right here. The referee was right by — in here.

Q. Let the record show that Mr. Milkovich is pointing to an area approximately in front of the Maple Heights bench, is that correct?

A. Yes.

Q. About 10 feet. Now, Mr. Milkovich, when this altercation occurred, what in fact did you see or observe or have first-hand knowledge as relates to the participants?

A. I didn't see the boy throw a punch.

Q. When did the boy punch the Mentor boy.

A. I didn't see any of this.

Q. I see.

A. The only thing I saw is when they started to fight I got a hold of some fans and told them to go on back into the stands. I started pushing them back.

Q. Were the fans unruly at that point?

A. No, not up until that point. As a matter of fact, I could not say it was Maple Heights fans because the Maple Heights fans — over to the left Mentor was out to the — right behind their bench.

Q. Were the Mentor fans unruly?

A. Up until that point?

Q. Yes.

A. No.

Q. Were they at the point of the altercation?

A. I would say they were highly vocal, made remarks.

Q. Were the Maple Heights fans doing the same thing?

A. There was much cheering going on during the wrestling match — nothing unruly, not from Maple Heights.

Q. In back of the Maple Heights bench which is approximately, for the Court's information, about where you are standing, was there a crowd there?

A. There might have been two or three people back there.

Q. Do the rules of High School Athletic Association provide or require or prohibit fans from being present at your bench?

A. I don't know. I have raised the question. In tournaments there is no place for a coach or a team that is separate because there are so

many teams. There is no place in our conference where we have a place to sit. You sit in the front row with the fans in back of us. However, we provided a separate area for our wrestling team and visitors.

Q. Mr. Milkovich, would you tell the Court exactly what is meant by altercation? What actually took place? What is the altercation we are talking about that took place at this bench?

A. First of all the altercation occurred after we were penalized a point for unnecessary roughness. Then when the coach told this boy — -

Q. Which coach?

A. The Mentor coach, Jim Schonauer and he didn't want his boy to continue. That meant they picked up six points. Then as kids often do there are remarks back and forth on the benches. They said, "We got six easy points" and I guess words were exhanged. This is what I learned after I quizzed the kids.

Q. Was there an actual fight?

A. I could not tell. I didn't see it.

Q. I see. Did you see anything at all, unruliness or disruptive on Maple Heights or Mentor's part between the respective wrestlers?

A. No.

Q. Was there a scuffle of any kind?

A. I saw a mass of people.

Q. You saw a mass of people?

A. Yes.

Q. Were the wrestlers involved in that mass?

A. Some of them were over there, yes.

Q. You did not see any fighting of any kind?

A. No.

Q. What was your reaction to this altercation. What did you do?

A. After we settled the fans I got on the microphone and told the fans that if we had anymore of this we would clear the gym and have the wrestling match without any fans.

Q. Did the crowd quiet down?

A. They quieted down and were well behaved. It was just a perfect match.

Q. Now, what was the referee at the point?

A. Frank Fiore. F-i-o-r-e.

Q. Did Mr. Fiore censure you in any way. What was his reaction to this?

A. None at all. I have known Frank for well over 20 years as a coach and official in tournaments and matches. We have never had anything but the finest of rapport.

Q. Did Mr. Fiore censure you in any way for your

* * * * *

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

PATRICK J. BARRETT, *et al.*, *Plaintiff,*	)	CASE NO. 74CV-09-1300
-vs-	)	
OHIO HIGH SCHOOL ATHLETIC ASSOCIATION, Defendant.	)	

AFFIDAVIT

I, John W. Saffell, Assistant Official Court Reporter in the Court of Common Pleas of Franklin County, Columbus, Ohio, being first duly sworn, state that I was the duly appointed Court Reporter to record the hearing of the above matter before the Honorable Paul W. Martin, Judge, in its entirety;

That the attached Extract of Testimony has been extracted from my stenotypy notes and compared with the official transcript having been filed in the Franklin County Court of Appeals;

That the attached Extract of Testimony is a true and accurate transcript thereof.

John W. Saffell /s/
John W. Saffell, Assistant
Official Court Reporter

Sworn to before me and signed in my presence at Columbus, Ohio, on this 1st day of November, 1976,

My commission expires
20 August 1978.

Christine M. Taylor /s/
Christine M. Taylor, Official
Court Reporter.

EXHIBIT H

cc William Cain, Principal, Maple Heights
Mrs. Peg Hanrahan, Prin. Mentor
Ernest A. Zimmerman, Prin. Eastlake North

Mr. Michael Milkovich Sr.
Wrestling Coach
Maple Heights High School
5500 Clement Drive
Maple Heights, Ohio 44137

Dear Mr. Milkovich:

I have been instructed by the State Board of Control of the Ohio High School Athletic Assocation to write to you regarding the incident that happened at your wrestling match with Mentor High School.

From the reports studied by the State Board they were of the unanimous opinion that you were derelict in your responsibility to insure that members of your wrestling team conducted themselves the way high school athletes are expected to. There was a distinct feeling that if you had taken proper precautions your team would have not become involved with the Mentor High wrestlers.

Coaches have a great responsibility in crowd control and it all begins with, first of all, controlling yourself and members of your team and if this is done in a proper manner crowd control then becomes a very minor problem.

We sincerely hope that your fine record at Maple Heights, as a wrestling coach, will be further exemplified in your young athletes as good wrestlers and most importantly, good sports.

Sincerely yours,

Dr. Harold A. Meyer
Commissioner

HAM:ha
March 5, 1974

EXHIBIT L

For MAY, 1974

BOARD MINUTES

February 28, 1974

The State Board of Control of the Ohio High School Athletic Association conducted the regular monthly meeting on February 28, 1974 in the Association office in Columbus, Ohio.

Board members present were: Blair Irvin, President; Duane Bachman, Vice President; Dana Auckerman; James Burrier; Alfred Lopez; John Wickline; Robert L. Holland, State Department of Education, Ex-Officio; Dr. Harold A. Meyer, Commissioner; George D. Bates, Associate Commissioner; Fred. L. Daller, Assistant Commissioner; Dolores A. Billhardt, Assistant Commissioner and Richard L. Armstrong, Executive Assistant.

Others present were: Ted Federici, representing the OHSFCA; Charlotte Basnett, DGWS; Bernadine Reinhardt, OHSAA Girls Advisory Committee; Ned Forman representing BASA; Dick Sherman representing OHSADA; George Strode, AP; Fred Church, representing OHSBA; Frank Sellers, Scripps-Howard; Michael Milkovich, Maple Heights High School; T. "Doc" Wylie, Athletic Director, Maple Heights High School; Mike Milkovich, Jr., Maple Heights High School; William Cain, Principal, Maple Heights High School, H. Don Scott, Superintendent, Maple Heights High School; Doug McCormick, Scripps-Howard; Frank Domokos, Athletic Director, Mentor High School; Peggy Hanrahan, Principal, Mentor High School; Jim Schonauer, Wrestling Coach, Mentor High School; John Goodwin, Mentor High School; Dave Clinefelter, Mentor High School; Ted Diadiun, Willoughby News Herald; Gene Schmidt, Mayfield High School; Don Drebus, Willoughby South High School; Charles Grottenthaler, Superintendent, Mentor School District; May Crosten representing OATCCC and Bob Whitman, Columbus Citizen Journal.

* * * * *

Maple Heights Wrestling Team
Placed on Probation

Moved by Duane Bachman, second by Al Lopez that effective March 1, 1974 the Maple Heights High School wrestling team be placed on probation until the end of the 1975-76 school year and be declared ineligible for the 1975 OHSAA state sponsored Wrestling Tournament. Letters of severe censure are to be sent to the Varsity and Junior Varsity Wrestling Coaches at Maple Heights and copies of the letters are to be forwarded to the Administrative head of the school. The Maple Heights High School Principal is to re-evaluate the entire wrestling program to insure the safety of participants and spectors at all wrestling meets. Unanimously carried (Newspaper men present agreed to a Friday, March 1, 1974, 10:00 A.M. release time to permit OHSAA to notify schools of decision.)

Adjournment

* * * * *

EXHIBIT Q

In my ten years of coaching I have never, ever told a boy to lay down. Certainly, I believe this is unethical and Mr. Milkovich's charges to this effect in the various papers and as he has indicated in the court proceedings in Franklin County are completely false and I resent it very much.

I feel very, very strongly that Mr. Milkovich's actions and the actions of his son, Mike Jr., who is the assistant coach, caused the incident to break out, and certainly he could have prevented this from happening with different actions.

I have discussed the above matters several times with writer Ted Diadiun prior to the publication of the article in January of 1975.

James M. Schonauer /s/

James Schonauer, Mentor
Wrestling Coach

Sworn to before me and subscribed in my presence this 10th day of June, 1976.

James K. Collins Jr.

Notary Public

James K. Collins Jr., Notary Public
Lake County, Ohio
My Commission Expires Mar. 16, 1981

EXHIBIT I

STATE OF OHIO	)	IN THE COURT OF
	)	SS: OF COMMON PLEAS
LORAIN COUNTY	)	LAKE COUNTY, OHIO
	)	CASE NO. 75-CIV-0301
MICHAEL MILKOVICH, SR., *Plaintiff.*	)	
-vs-	)	AFFIDAVIT OF
THE NEWS-HERALD, *et al.* *Defendants.*	)	*PEGGY O. HANRAHAN*

I am the Principal of Mentor High School.

The following is a statement of my investigation of the Mentor-Maple Heights scheduled wrestling match held at Maple Heights High School on Staurday, February 9, 1974.

At this match, three Mentor wrestlers were injured by Maple Heights wrestlers and spectators.

This report is a chronological sequence of events prior to, during, and following the melee in which the injuries were sustained. The information contained in this account was obtained by me from personal interviews I conducted with Mentor school personnel who were present at the wrestling match and is true to the best of my knowledge and belief. The Mentor school personnel with whom I consulted were: James Schonauer, varsity coach; John Goodwin, assistant varsity coach, David Clinefelter, junior varsity coach; Frank Domokos, acting athletic director. Mr. Schonauer and Mr. Goodwin were seated with the varsity team, Mr. Clinefelter with the junior varsity team while Mr. Domokos was seated in the visiting team bleachers.

At the conclusion of the 145 pound bout, the Maple Heights' wrestler twice refused to shake hands with the Mentor wrestler, and the referee asked him to comply with the end of the match procedure. At the insistence of the referee, the Maple Heights wrestler finally shook the Mentor wrestler's hand.

In the middle of the third period of the 155 pound match, the Mentor wrestler was hit on the back of the head with a forearm; the Maple Heights wrestler was called for unnecessary roughness and penalized by the referee. The Mentor wrestler was injured by the blow and was assisted to the side of the mat by the Mentor varsity coach and trainer. At this time, the Mentor coaches asked for a doctor and found that none was available; therefore the wrestler was treated by the coach and trainer. During the allotted three minute medical time out, the Maple Heights junior varsity coach left the junior varisty team, which was at the opposite end of the gymnasium, went to where the Mentor wrestler was lying, and yelled, "Make the kid wrestle. That's a cheap way to get six points." The referee waved him back to the Maple Heights side of the varsity mat, where he talked to the Maple Heights varsity coach, Mike Milkovich.

Subsequently, he returned to the area in front of the Mentor bench on at least two different occasions and he indicated to the Mentor team, "That's the only way you will win a match here."

As stated in Rule 8-2-1 of The National Federation Rule Book with comments on page 32, when no physician is present, the coach must determine whether a wrestler is fit to continue the match. The Mentor coach applied the standard fitness tests, and determined that the wrester could not count fingers nor grasp, with any strength, the coach's hand. To secure a further opinion on the boy's fitness to continue, he called the Maple Heights coach over to where the Mentor wrestler lay. Upon his arrival, Mike Milkovich said, "Jim, the boy's not hurt. Put him back and make him wrestle." He did not examine the wrestler. He then turned away, demonstrably threw his hands up in obvious gesture of disgust, and said to the Mentor coach and in the injured wrester, "Schonauer, if you want the God damn match that bad, then take it." At this point, the crowd was in an uproar. During the medical time out, the 155 pound Maple wrestler walked around the mat, throwing his head gear on the floor, gesturing wildly with his arms and shouted. Also, during this time, the Maple Heights wrestler taunted the Mentor team with such statements as: "Fish", "Fairy",

It is my belief that the *Embers* decision was ill-considered and that a simple negligence standard is inappropriate. Any standard that punishes certain speech is likely to encourage self-censorship. Thus, the validity of any judicially contrived scheme which leads to such a result requires an identifiable state interest that is an appropriate counterweight for our constitutionally protected interest in unfettered speech. Rules, impervious to constitutional attack when applied to ordinary human behavior (*i.e.*, one must exercise reasonable care in conduct), have to be altered or discarded when used to regulate speech. Although I would not require proof of actual malice, where private persons are involved, some intermediate standard is needed. This standard would require some showing of recklessness on the part of the defendant. Alternatively, a showing of negligence should require a greater quantum of proof.

In *New York Times Co.*, the court held that an act of recklessness was sufficient to prove malice. Thus, a defamatory statement published recklessly could render the publisher liable. My problem with this equation is that malice is intent-based and recklessness is not. Black's Law Dictionary (5 Ed. Rev. 1979) 862, defines "malice" as:

"The intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent. A condition of mind which prompts a person to do a wrongful act willfully, that is, on purpose, to the injury of another, or to do intentionally a wrongful act toward another without justification or excuse. A conscious violation of the law (or prompting of the mind to commit it) which operates to the prejudice of another person. A condition of the mind showing a heart regardless of social duty and fatally bent on mischief. • • •" (Citations deleted.)

"Recklessness" is defined in Black's, *supra*, at 1142-1143, as:

"Rashness; heedlessness; wanton conduct. The state of mind accompanying an act, which either pays no regard to its probably or possibly injurious consequences, or which, though forseeing [*sic*] such consequences, persists in spite of such knowledge. Recklessness is a stronger term than mere or ordinary negligence, and to be reckless, the conduct must be such as to evince disregard of or indifference to consequences, under circumstances involving danger to life or safety of others, although *no harm was intended*. • • •" (Citation deleted, emphasis added.)

Thus, the knowledge and appreciation of a risk, short of substantial certainty, are not the equivalent of intent. A publisher who acts in the belief or consciousness that the publication of an article involves the potential loss of reputation or harm to a private individual may be negligent and if the risk is great, his conduct may be characterized as reckless or wanton, but it should not be classed as an intentional wrong. Accordingly, actual malice should lie only upon a showing of the intentional publication of false statement. Where private individuals are involved, rather than a showing of mere negligence, I would require a showing of recklessness or gross negligence, in derogation of accepted journalistic standards.

This approach was taken in the case of *Chapadeau* v. *Utica Observer-Dispatch, Inc.* (1975), 38 N.Y. 2d 196, 341 N.E. 2d 569. The New York Court of Appeals held at 199 that:

"• • • [A] party defamed may recover • • • [once he establishes] by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."

The application of such a standard strikes a more appropriate balance between the First Amendment freedoms guaranteed the press and the individual's right to privacy.

Alternatively, if an ordinary negligence standard is to be applied, the quantum of proof required should be more than a preponderance of evidence. Although the "beyond a reasonable doubt" standard is exclusively applied in criminal cases, it is my opinion that a showing of its functional equivalent should be required in private person libel suits. Operationally, this would require a plaintiff to prove that no reasonable doubt exists as to a publisher's failure to exercise due care under the circumstances.

Regardless of the nature of the harm, states have a legitimate interest in providing their citizens with a remedy. However, the presence of our First Amendment values requires states to use finer, more discriminating instruments to regulate speech in order to protect those values. I would overrule *Embers* in favor of a standard or quantum of proof which accommodates both protection of speech and press and the state's interest in redressing harm to its citizens.

IV

In conclusion, the First Amendment guarantee of freedom of speech provides us with the right to think as we will and to speak as we think. *Whitney* v. *California* (1927), 274 U.S. 357, 375, Brandeis, J., concurring. When we are tempted, in any way, to move to restrict these precious rights, it is well to remember the historical consequences of the formulation of the First Amendment. When the Constitution was adopted, a number of people strongly opposed it on the basis that the document contained no Bill of Rights to safeguard certain freedoms. See 1 Annals of Congress (1834) 448 *et seq.* One of the greatest fears was that new powers granted to a central government might be used to curtail freedom of religion, press, assembly and speech. In answer to these concerns, James Madison suggested a series of amendments which, if adopted, would assure that these great liberties would remain safe and beyond the power of *any* branch of government to abridge. It is my judgment that in preserving the freedoms of speech and press, guaranteed by the First Amendment, we must accord protection to the expression of ideas we abhor or sooner or later such protection of expression will be denied to the ideas we cherish.

The First Amendment gives a special protection to the press from the chilling effect of defamation litigation. This is a protection we must preserve at any and all cost and, accordingly, as far as the majority's decision today reinforces this protection, I heartily concur.

WRIGHT, J., concurring. I concur in Justice Locher's decision. He provides the bench and bar with sensible guidelines as to when a writing should be treated as an expression of opinion, and a meaningful definition of who qualifies as a public figure.

Almost two hundred years after the passage of the First Amendment guarantee of freedom of speech, some folks are still debating the wisdom of that idea. That, of course, is what this case is all about. All of us should be free to speak, read or hear views of whatever may be of interest. It is this particular right that distinguishes the rights of our citizenry from those of people living under fascism or communism.

As the law of libel has developed in this country, courts have been forced to distinguish between statements of fact and opinion. The common law allowed libel defendants a qualified privilege of fair comment on matters of public interest when the statements were based upon disclosed or publicly available facts and made honestly and without malice. See, *e.g.*, Prosser, Law of Torts (4 Ed. 1971) 819-820. In *Gertz* v. *Robert Welch, Inc.* (1974), 418 U.S. 323, the United States Supreme Court raised statements of opinion to the level of constitutionally protected free speech. Justice Locher quotes with approval the basic premise of *Gertz* that: "* * * Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. * * *" *Id.* at 339-340. I believe the framers of our Constitution felt that an informed electorate was the genius of our system. Thus, in my view, free speech is the brightest star in our constitutional constellation.

Sharp criticism of a governmental official produces a far greater public good in a democracy than does artificial respect fostered by suppression of such opinion. "Progress generally begins in skepticism about accepted truths. The danger that citizens will think wrongly is serious, but less dangerous than atrophy from not thinking at all. Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our government to keep the citizen from falling into error; it is the function of the citizen to keep the government from falling into error." *American Communications Assn.* v. *Douds* (1950), 339 U.S. 382, 444. If this court sanctions in any form interference with the ideas of the opinion-maker, our claim to be guardians of a free press is hollow.

As Judge Harry T. Edwards said from the bench during oral argument in *Ollman* v. *Evans* (C.A. D.C. 1984), 750 F. 2d 970, "When you read the [libel] cases, they are a mess." Sanford, Libel and Privacy (1985) 107. It is practically impossible to reconcile the case law in this area and Justice

Locher has wisely eschewed such a course. Instead, we have made it clear that opinions stated in a column, cartoon or an editorial are constitutionally protected free speech. Thus, rather than rely on a legacy of confusion, we have adopted the fundamental premise that the media has the right as well as the duty to inform the public through editorial comment, however harsh, on any matter of genuine public interest.

I agree with Justice Locher's rejection of the standard found in the Restatement of the Law 2d, Torts (1977) 170-172, Section 566, Comment *a*, which provides that "mixed" statements of fact and opinion are libelous if the underlying facts are not stated and if the opinion can reasonably be taken to imply the existence of defamatory facts. The Restatement approach focuses on possible reader reaction, which is a difficult standard for evaluation. Also, the Restatement approach requires courts to engage in the nearly impossible task of forming standards for intelligently analyzing the difference between a "pure" statement of opinion as opposed to a "mixed" opinion that implies defamatory facts.[5] Justice Locher has wisely held that any statement of opinion, whether pure or mixed, will not form the basis for an action in tort.

I would go a step further than my colleagues, however, and grant the media the right to attain absolute protection by identifying an article as opinion. A column without such a label which is outside the editorial opinion portion of the paper would be treated as fact and be afforded only the limited protection articulated in *New York Times Co.* v. *Sullivan* (1964), 376 U.S. 254. A like test would apply to radio or television programming. I would reject any approach that requires the trial court to determine whether or not the statements are susceptible to proof of truth or falsity. If the context of the statement is in the nature of editorial comment it should be treated as privileged free speech.

This "bright-line" rule would eliminate the uncertainty of characterizing statements as opinion or fact. It would provide predictability and fairness in an area of the law which is presently a legal morass. Such a rule would be helpful to the media and would serve the public interest as it lends itself to ready compliance yet protects vital free speech interests in the expression of opinion.

The dissenters' remarks concerning the doctrine of *stare decisis*

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[5] As an illustration, note the learned remarks contained in Notes, Fair Comment (1949), 62 Harv. L. Rev. 1207, 1213: "The statement in question should be regarded as one of fact if a substantial number of readers would understand it as intended to convey ideas the asserted validity of which is independent of the belief of the person making the statement. If a substantial number of readers would understand the statement to rest solely on the opinions of the person making the statement, the statement should be regarded as comment and should come within the privilege if the matter is one of public interest." I pity the poor trial judge who attempts to wrestle with such an ambiguous definition! The reader-oriented approach obviously provides little or no assistance to the bar or bench as to how one may gauge the reaction of readers, what sampling is necessary, or which readers to consult.

deserve comment. First of all, I rejoice in their charismatic conversion. Second, it is clear that the demise of *Milkovich* v. *News-Herald* (1984), 15 Ohio St. 3d 292, presents no revolutionary changes in the law of libel. To the contrary, a dearth of decisional law supports *Milkovich* and much case law militates a contrary conclusion. Third, as Justice Locher points out, when a past decision of this court is *plainly* mistaken and destructive of a constitutional imperative such as freedom of speech, we should not hesitate to confess our error. As Justice Locher demonstrated, in *Milkovich* no test was offered with regard to distinguishing fact from opinion and no analysis was given to support the court's conclusion. Thus, the "rationale" in *Milkovich* was fatally flawed.

I believe in the doctrine of *stare decisis* and I will continue to support this doctrine, regardless of my personal predilections as to public policy in some particular area of the law. Precision and consistency are values of the highest order in judicial decision-making. Populist jurisprudence only creates unpredictability in the law. While understanding that the common law is not immutable, we should strive to follow past experience and precedent. Justice Locher's opinion does no violence to these concepts.

Accordingly, I concur.

CELEBREZZE, C.J., concurring in judgment only, and dissenting in part. I wholeheartedly concur in the majority's conclusion that appellant is a public official. Similarly, I support the majority's determination that appellant failed to establish the requisite actual malice in the publication of the article at issue. With the resolution of these two issues and this court's affirmance of the grant of summary judgment to appellee, the News-Herald is insulated from liability. But the majority plunges on. It needlessly overrules our prior decision in *Milkovich* v. *News-Herald* (1984), 15 Ohio St. 3d 292, certiorari denied (1985), ___ U.S. ___, 88 L. Ed. 2d 305, in which this court held that the statements in this same article were, as a matter of law, factual assertions.[6] The clarity of today's majority opinion gives way to the amorphous "totality of the circumstances" test which is used to complete the Jekyll and Hyde transformation of this newspaper article from fact to opinion.[7] This test is not only unworkable, it is applied by the majority in self-contradictory fashion to reach an untenable result.

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[6] If our decision in *Milkovich*, *supra*, was so "plainly" in "error," one wonders how the United States Supreme Court could have allowed the decision to stand.

[7] The totality of the circumstances test adopted by the majority was enunciated in *Ollman* v. *Evans* (C.A. D.C. 1984), 750 F. 2d 970, 979, in which the court stated, in pertinent part:

"We believe * * * that courts should analyze the totality of the circumstances in which the statements are made to decide whether they merit the absolute First Amendment protection enjoyed by opinion. * * * [W]e will evaluate four factors in assessing whether the average reader would view the statement as fact or, conversely, opinion. * * *

"First, we will analyze the common usage and meaning of the specific language of the challenged statement itself. * * * Second, we will consider the statement's verifiability * * *. Third, * * * we will consider the full context of the statement * * *. Finally, we will consider the broader context or setting in which the statement appears. * * *"

The article culminates with the statement that appellant lied under oath while testifying at a court hearing, *i.e.*, that appellant committed the crime of perjury. The majority admits that the truth or falsity of such a statement can be verified. (I must, however, question the majority's implication that appellant should somehow cause a criminal prosecution against himself to do so.)

In its tortuous route to the preordained result that this denigrating statement is a constitutionally protected expression of opinion, the majority next searches for qualifying "language of apparency." While first stating that terms such as "I think" or "in my opinion" are *not* dispositive, the majority then ignores its own logic by concluding that readers would assume this entire article was opinion merely because it was captioned "TD Says" and "Diadiun says." This conclusion escapes me. Rather, I would have thought, as Justice Brown points out, that the purpose of a caption is to identify the writer.

The majority finally proceeds to the determination that readers would not construe the statement in this news article as fact because it appeared on the sports page.

Apparently, the majority feels that serious journalism and factual reporting are not likely to be found in the sports pages of a newspaper. I must disagree. Sports journalists are no less likely than other journalists to be informed about procedural due process or perjury, as recent lengthy accounts of legal proceedings involving drug abuse by professional athletes demonstrate. Sports writers are as accountable for the accuracy of their reporting as are their brother news journalists. The assumption that most readers view sports columnists as colorful and opinionated but innately lacking in credibility is, in my view, inaccurate, condescending, and cannot serve as the basis for the ridiculous conclusion that the statement in issue was "probably" opinion because it appeared on the sports page. Would the majority be forced to conclude that the statement in this article was "probably" fact had it appeared on the front page? If in doubt on the accuracy of an article, should editors run the news story in the sports or comic section to be on the safe side?

I am convinced that this court was right the first time, in *Milkovich*, *supra*. Although the column undeniably contained the writer's opinion in certain respects, it also contained the specific factual assertion that appellant lied while under oath. This statement was verifiable. Its location on the sports page was not a reliable indication that this statement was to be taken as opinion. Finally, there was nothing in this article which would have alerted the reader that this statement was intended to be the writer's opinion. To the contrary, Diadiun bolstered the assertion in part with a

quote from Dr. Harold Meyer to the effect that appellant had told some "pretty darned unfamiliar" stories to the judge. In essence, Diadiun was telling his readers this was not just his biased view, but rather the objective conclusion of an impartial observer at the hearing. From this followed Diadiun's direct and factual assertion that, based on Dr. Meyer's observations, appellant had lied under oath. Try as it may, the majority cannot drown this fact in a sea of opinion.[*]

There is an additional pitfall in today's conclusion that this alleged defamatory statement is not actionable. The majority acknowledges that the "clear impact" of this statement, as "commonly understood," is that appellant committed the crime of perjury. Such criminal accusations, even if expressed as opinion, are not entitled to absolute constitutional protection.

In *Rinaldi* v. *Holt, Rinehart & Winston, Inc.* (1977), 42 N.Y. 2d 369, 397 N.Y.Supp. 2d 943, 366 N.E. 2d 1299, certiorari denied (1977), 434 U.S. 969, a state court judge brought a libel action against the publishers of a book which described him as being corrupt. The New York Court of Appeals held at 382 that this statement was not protected as opinion.

"Accusations of criminal activity, even in the form of opinion, are not constitutionally protected. * * * While inquiry into motivation is within the scope of absolute privilege, outright charges of illegal conduct, if false, are protected solely by the actual malice test. As noted by the Supreme Court of California, there is a critical distinction between opinions which attribute improper motives to a public officer and accusations, in whatever form, that an individual has committed a crime or is personally dishonest. No First Amendment protection enfolds false charges of criminal behavior." Accord *Cianci* v. *New Times Publishing Co.* (C.A. 2, 1980), 639 F. 2d 54, 64; *Gregory* v. *McDonnell Douglas Corp.* (1976), 17 Cal. 3d 596, 604, 131 Cal. Rptr. 641, 552 P. 2d 425.

I am unable to see the qualitative difference between a charge that a public official is corrupt and the instant accusation that a public official committed the crime of perjury.

Thus, not only does the majority strain to label as opinion the factual assertion that appellant lied under oath, it also fails to recognize that such a statement, even if opinion, is not entitled to unqualified constitutional protection where criminal conduct is alleged. Therefore, the appellees in the instant cause are entitled to the protection of the rule in *New York Times Co.* v. *Sullivan* (1964), 376 U.S. 254 (plaintiff who is a public official

[*] Under the elastic test adopted by today's majority, the only thing which is clear is that a statement's characterization as fact or opinion is truly in the eye of the individual judge. Rather than providing "predictability," the cryptic totality of the circumstances test leaves those in search of stability with as much guidance as that provided by the newspaper's daily horoscope.

must prove with convincing clarity that defendant acted with actual malice), but no more.

Accordingly, since I agree that appellant is a public official and has not established actual malice in the publication of this article, I concur in the judgment. I respectfully dissent from my brothers' unfortunate conclusion that the alleged defamatory statement in this article is an opinion entitled to absolute constitutional protection.

SWEENEY, J., concurring in judgment only, and dissenting in part. While I concur in the majority's decision with respect to appellant's status as a public official, and that appellant failed to prove that the article in issue was written with actual malice, I must dissent from the majority's nullification of our very recent opinion in *Milkovich* v. *News-Herald* (1984), 15 Ohio St. 3d 292. In addition to the well-reasoned points raised by Chief Justice Celebrezze and Justice Clifford Brown, I wish to make several of my own observations.

The majority opinion chides the *Milkovich* majority for not resting its decision on any particular rule, and then sets forth a nebulous "totality of circumstances" test that pretends to establish an analytical framework for resolving controversies dealing with the fact-opinion dichotomy. The central problem with the test provided by the majority is that it tumbles into the very pitfalls that it claims should be avoided.

In exploring the nuances of the majority's test, we find that with respect to the first factor, the majority readily concedes that the language used in the instant article, standing alone, "would have stated a valid cause of action." Thus, this factor does not fortify the majority's final conclusion in any way.

The second factor employed by the majority, *i.e.*, whether the allegedly libelous statements made are verifiable, is inherently suspect, especially in light of the facts of the cause *sub judice*. The majority's flawed analysis under this factor would require appellant to press perjury charges against himself in order to gain an acquittal, and then, if successful, commence the instant libel action. The absurdity inherent in this factor is further revealed by the fact that even if appellant were to be acquitted of perjury, it would not necessarily make appellees more likely to be liable for defamation, since each action would entail differing burdens of persuasion.

Turning to the third factor enunciated by the majority, we find confusion and inconsistency throughout its reasoning. The majority chastises this court's opinion in *Milkovich*, *supra*, for being conclusory, and then turns around and engages in the type of conclusory analysis that it condemns! The majority spends much time discussing the relevancy of labeling or "language of apparency," but fails to judiciously scrutinize the content of the article in issue. Although the majority is correct in stating that the author of the article was undeniably biased, it fails to carefully consider the ramifications of the message the author is conveying.

In my view, the instant article sets forth both assertions of fact and

the opinions of its author. In essence, the author states as fact that he attended the wrestling match and the OHSAA hearing, and that Dr. Meyer was present at the due process hearing. After quoting Meyer concerning Milkovich's and Scott's testimony (a quote which Meyer denies making), the author asserts that anyone who attended the wrestling meet knows in his heart that Milkovich and Scott lied under oath at the due process hearing. Such, in my mind, is clearly an assertion of fact.

While the majority is "mindful" of Judge Friendly's observation that, "[i]t would be destructive of the law of libel if a writer could escape liability for accusations of crime simply by using, explicitly or implicitly, the words 'I think,' " *Cianci* v. *New Times Publishing Co.* (C.A. 2, 1980), 639 F. 2d 54, 64, the majority fails to effectively and seriously reconcile this ideal in relation to the article in issue. In this vein, I believe that this court should reaffirm the principles articulated in *Milkovich, supra,* and apply the rationale supplied by the court in *Cianci, supra,* along with the decisions rendered in *Rinaldi* v. *Holt, Rinehart & Winston, Inc.* (1977), 42 N.Y. 2d 369, 397 N.Y. Supp. 2d 943, 366 N.E. 2d 1299, certiorari denied (1977), 434 U.S. 969; and *Gregory* v. *McDonnell Douglas Corp.* (1976), 17 Cal. 3d 596, 131 Cal. Rptr. 641, 552 P. 2d 425.

Under the majority's fourth factor, a veritable *per se* rule is created whereby anything defamatory that appears in the sports pages is automatically non-actionable. As with the other factors used in this new "test," the "context" factor is full of self-contradictions and conclusions based on perfunctory and hollow analysis. Also, the majority scoffs at the notion of applying "a bright-line rule" to classify articles as being assertions of fact or opinion, and then curiously engages in the bright-line rule-making that it scorned in its third factor, by holding, *inter alia,* that "'TD Says" means TD's opinion, and essentially that anything appearing in the sports pages is, by definition, opinion. Particularly disturbing is the majority's flippant remarks about sports writers and the people who read the sports pages. Such a tasteless and unwarranted attack is both haughty and snobbish.

In sum, the majority's new "test" is in reality no test at all, because its components can be juxtaposed to forge any interpretation that the user of the "test" desires. I believe that the majority's "test" is patently arbitrary, and too unreliable to be given this court's imprimatur.

Equally flawed, in my view, is the concurring opinion that attempts to solve the fact-opinion distinction by suggesting that the print media label an article as an "editorial" or "opinion," in order to signal readers that the article that follows is constitutionally protected. While such an approach would arguably add precision to the reconciliation of fact-opinion issues, it would necessarily be deficient since it is the content as well as the context of an article that assists the ultimate determination of whether a particular newspaper article presents a potentially redressable action in libel. As applied to the instant cause, even if I were to accept the

majority's premise that "'TD Says" indicates that the article represents only the views of the author, I would still be unpersuaded that the accusations of perjury made by the writer should be unconditionally protected as the majority preaches. Again, I sincerely believe that the majority has seriously erred by refusing to place any legitimate weight on the cogent rationale adopted by this court in *Milkovich,* and set forth in *Cianci, supra,* and other like precedents.

With respect to the discussions of *stare decisis,* I find it somewhat amusing that some of my fellow justices have been forced to explain why this doctrine should not be applied in this cause. One of the concurring opinions states that *stare decisis* has no application *vis-a-vis* the *Milkovich* case because "a dearth of decisional law supports *Milkovich* and much case law militates a contrary conclusion." Even if this assertion were correct, which it is not, such a rationale is wholly inadequate. Simply because there is a "dearth of decisional law" supporting a holding does not make such holding ill-conceived or untenable; otherwise, under the concurring opinion's reasoning, *Brown* v. *Board of Education* (1954), 347 U.S. 483, should have been overruled shortly after its decision, since "much case law militates a contrary conclusion" in line with the prior ruling rendered in *Plessy* v. *Ferguson* (1896), 163 U.S. 537.

All of the foregoing notwithstanding, I am pleased that the flood of separate concurring opinions in this cause exalting the primacy of the First Amendment finally pays due reverence to the United States Constitution and the freedoms it is supposed to guarantee to our citizens. Given the wholesale destruction of the Fourth Amendment by this court in recent cases, perhaps this new-found enlightened reasoning employed today will now spread to other constitutional controversies.

In any event, it would be more satisfactory if some of the concurring majority would restrain the pompous discourse concerning the importance of freedom of the press, and dispense with the platitudes. A more thorough approach to constitutional analysis would lead them to the inevitable discovery that the framers of the Ohio Constitution were especially cognizant of the potential for abuse that could occur in the establishment of a free press, and that is why this guarantee was somewhat tempered with a modicum of guidelines. Section 11, Article I of the Ohio Constitution states in plain and concise language: "Every citizen may freely speak, write, and publish his sentiments on all subjects, *being responsible for the abuse of the right;* and no law shall be passed to restrain or abridge the liberty of speech, or of the press. * * *" (Emphasis added.)

Thus, several of the majority are careless when stating, in effect, that the right to a free press should never be encumbered with any checks whatsoever. Certainly the framers of the state Constitution did not share this view when they crafted the above-stated constitutional provision. Under Ohio law, responsibility for the abuse of the right to freely speak and publish obviously and necessarily includes the limitations established in the law of defamation.

Overall, several of the majority seem all too willing to forget the numerous reports we hear concerning individuals, some with great notoriety and others who are not so well known, who are libeled by certain sensationalistic gossip publications typically found at most grocery store checkouts. I do not really intend to single out those particular publications, because many are scrupulous about the limits inherent in the right to a free press, and are aware of the harm that can be wrought by a libelous attack or accusation. However, I do intend to drive home a point to those in the majority who seem to intimate that freedom of the press necessarily means total immunity from suit, regardless of the venom or falsity contained in a particular news item.

There is no one sitting on this court who does not appreciate and cherish our constitutional guarantee of a free press; however, such a guarantee carries with it a duty owed to the public to be responsible and truthful, as well as bold and provocative. When this duty is seriously breached, the law provides injured persons with a mode of redress, which is why the law of libel was designed in the first place.

In closing, I wish to emphasize the abundant respect that I hold for the members of the journalistic profession. These individuals perform a vital function in society by disseminating topical information and commentary to the populace. Unfortunately, as is the case in all professions, a very small minority sometimes exceeds the limits of propriety by inflicting irreparable harm to the reputation of others. I am sure that the overwhelming majority of journalists would agree that some type of redress is necessary in appropriate cases, in order to uphold the integrity and ideals of the journalistic profession. In such cases, we rely on the courts to insure that the important interests underlying the First Amendment and Section 11, Article I of the Ohio Constitution are weighed in combination with Section 16, Article I of the Ohio Constitution, which sets forth the state's interest in compensating injury to the reputation of persons in our society. *Gertz* v. *Robert Welch, Inc.* (1974), 418 U.S. 323. Although such a task is, at times, extremely difficult, we must always strive for the attainment of equal justice for all under the law, in order to maintain those freedoms guaranteed in both the federal and state Constitutions. While a free press is essential to the maintenance of a truly democratic society, the right to a free press also guarantees implicitly, and in the case of the Ohio Constitution explicitly, the rights of the individuals who lack the means of counterargument to rebut defamatory statements which cause injury to their reputations.

Based on all the considerations heretofore discussed, I join the majority's judgment in this case, but I dissent from its unnecessary, capricious and unwarranted disposal of *Milkovich, supra.*

CLIFFORD F. BROWN, J., concurring in part and dissenting in part. I concur in the majority's conclusion that under the reasoning of *Rosenblatt* v. *Baer* (1966), 383 U.S. 75, appellant, H. Don Scott, as superintendent of

the local public schools, is a public official for purposes of the law of defamation and that, as such, Scott failed to prove actual malice as required by *Dupler* v. *Mansfield Journal* (1980), 64 Ohio St. 2d 116 [18 O.O.3d 354]. Therefore, I agree that the appellees were entitled to summary judgment in the instant case.

However, I am compelled to dissent from the majority's convenient reconsideration and reversal of this court's recent holding that the very article we considered today constitutes an assertion of fact. See *Milkovich* v. *News-Herald* (1984), 15 Ohio St. 3d 292. In my view, *Milkovich*'s characterization of the language at issue in the instant case was sound law and should not be disturbed. Further, given the majority's resolution of the other issues, its treatment of *Milkovich* is both overreaching and gratuitous.*

As the majority correctly recites:

"It is implicit in the doctrine of *stare decisis* that some principle be established that the public may rely upon with the understanding it will not lightly be overturned. The underlying rationale for *stare decisis* is the importance of constancy and consistency in law. In the absence of consistency and constancy the value of law in society is diminished. * * *"

But having recited the underpinnings of *stare decisis*, the majority rejects the doctrine in this case, based upon its distorted and incomprehensible view that our opinion in *Milkovich* failed to set forth a workable "rule." Clearly, the majority's reading of *Milkovich* would discount the paragraph wherein, having recited the options selected by other courts, we stated: "While we decline to establish a *per se* rule in determining what constitutes a protected opinion or a potentially redressable assertion of fact [as, I note, today's majority also purports to decline], our review of the instant cause leads us to conclude that the lower courts erred in holding that the statements in issue were nothing more than the writer's 'heartfelt' opinion. We find that the statements in issue are factual assertions as a matter of law, and are not constitutionally protected as the opinions of the writer." *Id.* at 298-299. On what basis did the *Milkovich* majority reach that conclusion? Our two-prong "test" immediately followed: "*Nothing in the article effectively precautions the reader that the author's statements are merely his considered opinions. The plain import of the author's assertions is that Milkovich, inter alia, committed the crime of perjury in a court of law.*" (Emphasis added.) *Id.* at 299. If the majority today is so ready to castigate the *Milkovich* test, certainly its solution is no improvement. Indeed, I maintain that even under the "rule" purportedly adopted

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* One concurring opinion is advisory, dealing with pure *obiter dicta* which is designed to curry further adulation by the news media — which it most assuredly will — by intimating that *Embers Supper Club, Inc.* v. *Scripps-Howard Broadcasting Co.* (1984), 9 Ohio St. 3d 22, which was not argued below, should be overruled. The *Embers* case and the issues therein contained are not relevant to a determination of the present *Scott* case.

today by the "revolving door advocates" of *stare decisis,*[10] the statements considered in *Milkovich* and reconsidered today constitute assertions of fact and, as such, are not entitled to First Amendment protection as the opinions of the writer.

In applying its newly adopted "totality of circumstances test," even the majority concedes that the first factor, "the specific language used," creates "the clear impact of some nine sentences and a caption" that "appellant 'lied at the hearing after * * * having given his solemn oath to tell the truth.' " Thus, the language used states a factual assertion that appellant committed perjury. The majority so concedes, and the *Milkovich* majority so recognized.[11] (The only difference today is that the majority no longer seems to find this factor to be important.)

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[10] I use the word "purportedly," because despite the majority's contorted application of its new and improved four-factor test, any reader of today's majority opinion can readily see the real rule adopted by the majority: in a libel case, *the newspaper always wins.*

[11] In determining whether a statement is fact or opinion, the majority advances a purported "test" involving "at least four factors," and in support thereof cites a host of legal precedents from federal jurisdictions. A review of these cited cases reveals that none of them provides even the remotest foundation for this "test."

In support of the first factor, "specific language used," the majority cites *Cianci* v. *New Times Pub. Co.* (C.A. 2, 1980), 639 F. 2d 54, which holds that an article stating that a mayor had been accused of rape was not protected as a "statement of opinion," and does not support the defendants' thesis herein that the Diadiun statement was opinion, not fact. *Cianci, supra,* supports the holding in *Milkovich* that the Diadiun news article was a statement of fact and not an opinion. *Lauderback* v. *American Broadcasting Companies, Inc.* (C.A. 8, 1984), 741 F. 2d 193, is inapplicable because it dealt with statements in a TV broadcast by defendant that an insurance agent was dealing unscrupulously with elderly citizens, and unlike the Diadiun statement here, did not involve an allegation of criminal conduct by plaintiff. The United States Court of Appeals held that representations that an insurance agent was guilty of unethical behavior constitute opinion protected by the First Amendment. Likewise, *Lewis* v. *Time, Inc.* (C.A. 9, 1983), 710 F. 2d 549, is inapplicable because the defendant did not assert a criminal act by plaintiff. Instead, the gist of the United States Court of Appeals' holding is that the "[a]lleged inference arising from [the] magazine article that the named attorney was a dishonest 'shady practitioner' was a constitutionally protected opinion, because the article set forth the facts underlying the opinion that the attorney was a 'shady practitioner,' i.e., state court judgments against the attorney for fraud and malpractice." *Id.* at paragraph nine of the headnotes.

Natl. Assn. of Letter Carriers v. *Austin* (1974), 418 U.S. 264, is also totally irrelevant. The case did not involve a statement by defendant of criminal acts by plaintiff. The court held, and properly so, that the use of the epithet "scab" in the union newsletter could not be the basis of a state libel judgment. The same is true of *Greenbelt Cooperative Publishing Assn.* v. *Bresler* (1970), 398 U.S. 6, which held that the word "blackmail" in the circumstances of the case was not slander when spoken at the city council meeting nor libel when reported in the newspaper articles which were accurate, it being clear no reader could have thought plaintiff was being charged with the commission of a criminal offense. The Diadiun article in the present case is not even a remote relative of the *Greenbelt* case.

Neither does the cited case of *Ollman* v. *Evans* (C.A. D.C. 1984), 750 F. 2d 970, have any relevancy. It held that statements set forth in a newspaper column questioning the nomination of the plaintiff, an avowed Marxist, to a university post, were constitutionally protected

The majority previous thereto stated that the determination of whether an averred defamatory statement constitutes opinion or fact is a question of law for the court, and not for a jury. (See *Milkovich, supra,* at 298, wherein we held *as a matter of law* that the statement was a factual assertion.) It then wends its tortuous way through a four-factor "totality of circumstances test," alternately labeling the so-called factors as concerns. This is all by way of leading to the majority's conclusion that the Diadiun statement that plaintiff lied under oath (committed perjury) was constitutionally protected opinion and not a statement of fact as a *matter of law* both under the federal Constitution and the Ohio Constitution. This sounds exactly like Big Brother in Orwell's Nineteen Eighty-Four, where, by convoluted reasoning, contradictory terms or concepts are considered to be synonymous.[12]

The majority also concedes that the *second* factor, "whether the statement is verifiable," operates in appellant's favor on the facts of this case, because "[u]nlike a subjective assertion the averred defamatory language is an articulation of an objectively verifiable event." The majority's determination of these first two factors in favor of plaintiff should conclusively support a finding that the article is a statement of fact accusing plaintiff of the crime of perjury, and is therefore defamatory *per se.* However, in my view, the majority's abortive attempt to clear up the law of defamation with a workable test breaks down as it proceeds further and attempts to apply the *third* and *fourth* factors.

When applying the *third* factor, the "general context of the statement," the majority gives lip service to the "potential for abuse" which would occur if terms such as "in my opinion" or "I think" were held conclusively to distinguish expressions of opinion from assertions of fact, but then proceeds to find phrases which are indistinguishable from those terms determinative in this case. In my (apparently "most gullible") view, the caption "TD Says" is merely a "catchy" means of identifying the writer, and does not cut distinctively one way or the other as a signal that what follows will be opinion or fact. Similarly, the second headline,

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expressions of opinion, rather than assertions of fact, and were not actionable in a defamation action. The newspaper article did not ascribe any criminal conduct to plaintiff as did the Diadiun article herein.

Nowhere do the above-cited cases, singly or collectively, suggest anything resembling a four-factor test as set forth by the majority today. The result-oriented majority is bent on overruling *Milkovich.* Any irrelevant precedent was grabbed to lend superficial credence to their analysis and to frustrate easy analysis. Ohio now is unique in having unintelligible gibberish as a standard for actionable defamation of a private citizen. No other jurisdiction has experimented in this frenzied manner with such a standardless standard.

[12] Big Brother, in Orwell's Nineteen Eighty-Four, says the following:
"War is Peace
"Freedom is Slavery
"Ignorance is Strength"

". . .Diadiun says Maple told a lie" merely identifies the author of the factual assertion which follows.

The point is that the majority's new "test" is, in practice, so malleable and spongy as to permit any interpretation anyone wishes. It will enable any judge or reviewing court to label any clearly libelous statement of *fact* as a statement of *opinion* and thereby for all practical purposes create absolute immunity for every congenital liar who publicly utters or writes slanderous or libelous statements. Most likely, given a close reading, the article in question combines assertions of fact with expressions of opinion in the hope that the facts asserted will bolster the impact of the opinions. Nonetheless, that combination should not detract from the majority's specific finding that the language used imparts "the clear impact" that appellant committed the crime of perjury, and that the article reinforces that "impact" with a quotation attributed to a named, apparently reputable source, a fact which the majority characterizes as merely "troubling." Given the lack of clear guidance that the majority's "test" provides, this is an ideal case to apply the doctrine of *stare decisis*.

Finally, I look to the majority's analysis of the *fourth* factor: "the broader context in which the statement appeared." The majority's suggestion that sports writers are inherently less believable than others (for example, a "Law Correspondent") ought to belie any perceived legitimate legal analysis which follows. Indeed, this "*fourth* factor" really adds nothing to the other factors discussed *supra*, and submerges further into the morass of a Serbonian bog those seeking to distinguish a statement of fact from one of opinion in any future case. The clear message of the majority in the second to last paragraph of its opinion is that in order to avoid a defamation suit, one should put the controversial statement on the sports page, which is another way of saying that any fact appearing on the sports page is not to be believed because it is mere constitutionally protected opinion. All of the so-called four factors, concerns and/or tests amount to no more than a geyser spouting judicial steam, fog, and mist.

I note with interest Justice Holmes' particular judicial hypocrisy[13] as to the doctrine of *stare decisis* which, by his presence in today's majority, amounts to a double-standard of justice. When displeased by the majority's holding, Justice Holmes has often pontificated as to the sanctity of *stare decisis* and irreverence by its disregard. See *Saunders* v. *Zoning*

[13] I am particularly intrigued with Justice Holmes' concurrence, wherein he opines that "[i]t does no violence to the legal doctrine of *stare decisis* to right that which is clearly wrong. It serves no valid purpose to allow incorrect opinions to remain in the body of our law." If his position were not so transparently hypocritical on this case, I would welcome his conversion to my own oft-expressed views on the doctrine of *stare decisis*. However, I feel certain that his convenient retreat from his historical reliance on *stare decisis* will be limited to cases such as this one, in which he finds himself in a majority which is bound and determined to uphold the unabashed trammeling of the rights of individuals by big businesses such as the newspaper herein.

Dept. (1981), 66 Ohio St. 2d 259 [20 O.O.3d 244], in which Justice Holmes, dissenting, at 265, stated: "The flexibility effected by this decision, which, in effect, overruled syllabus law as pronounced by this court only nine months ago, * * * transforms the law of *stare decisis* into that which assumed a stability not unlike a revolving door. It would seem that the law of this state will be now governed by what might be the personnel of the court, or the panel hearing and writing upon a case, or both, at any given point in time." I note further that Justice Locher concurred in Justice Holmes' dissenting view in that case. And in *Shroades* v. *Rental Homes* (1981), 68 Ohio St. 2d 20 [22 O.O.3d 152], Justice Holmes, dissenting at 29, stated: "Again we find * * * that the law of this state, as most recently pronounced by this court, moves rapidly through the revolving door of change, further eroding any vestige of *stare decisis* that might remain as a legal principle to be followed by the bench and bar of Ohio." Further, at 31, Justice Holmes continued: "It would appear that 15 months is quite enough for the law of this state as pronounced by a majority of this court to be settled and followed by our legal community. * * * [T]he validity of *stare decisis* as a controlling principle in settling the law of this state is only valid under the condition of a non-changing pattern of the membership of the court—hardly a satisfactory condition of stability of the law upon which lower courts and practitioners in Ohio may reasonably rely.

"Believing in the principle of *stare decisis* where the same matter had recently been fairly debated and considered by this court, and where no additional relevant factors are presented which would alter our prior announcement on the subject, I would so adhere to our prior determination * * *."[14]

In the instant appeal, Justice Holmes now joins a bare majority of four which cavalierly overrules *Milkovich*, *supra*, decided less than two years ago and (coincidentally?) on the eve of this court's most recent change of personnel by the election of two new justices who took office in January 1985. These two new justices have joined Justices Holmes and Locher in smashing to smithereens their sacred doctrine of *stare decisis*. Justice Holmes has given nary the slightest indication for his apparent recant of reverence for the doctrine of *stare decisis*. Apparently, *stare decisis* is meaningful, in any case, only when Justice Holmes is part of a minority strongly opposed to the majority's visionary, progressive holdings. Justice Locher must share the same view. Such treatment truly renders *stare decisis* a doctrine of convenience in which the "revolving door" turns at the writer's pleasure.

In light of the transparently weak analysis the majority has employed to overrule and repudiate this court's recent holding as to precisely the

[14] See, also, *Baker* v. *McKnight* (1983), 4 Ohio St. 3d 125 (Holmes, J., dissenting, at 131); *Ady* v. *West American Ins. Co.* (1982), 69 Ohio St. 2d 593 [23 O.O.3d 495] (Holmes, J., dissenting, at 603).

same newspaper article at issue in *Milkovich*, Justice Holmes' own words in his dissent in *Wilfong* v. *Batdorf* (1983), 6 Ohio St. 3d 100, 109, again most appropriately describe the majority's action: "I strongly conclude that the law as most recently announced * * * should be followed by the court in this case. To do otherwise again completely demolishes any remaining semblance of the doctrine of *stare decisis* in this state. The only change that has taken place which would conceivably alter our position as announced in * * * [here, *Milkovich*, decided December 31, 1984] has been an intervening change of personnel on the court—precisely the type of changed circumstance that the doctrine of *stare decisis* has been relied upon to maintain the stability of the case law of this jurisdiction. What confidence may attorneys, judges and litigants have in the stability of the decisional law of this court? This query is self-answering."

The views expressed by the majority as well as by all three dissenting justices reveal that there is unanimity of all seven justices that the summary judgment in favor of defendants should be affirmed simply and solely by holding that plaintiff was a public official for defamation purposes, requiring proof of actual malice by defendants which, as a matter of law, was not established. We need go no further in reaching a unanimous judgment in favor of defendants.

In order to curry favor with the media at large in an election year, favor which is particularly beneficial to one of its majority, a majority of four rushes hell-bent to overrule *Milkovich*.[15] The so-called champions of *stare decisis* are anything but that when the prior decision is at odds with their own preconceived jurisprudential agenda. It takes more judicial courage and backbone to express what is right and just, confining the decision to the short, single issue necessary to complete the resolution of this case, than to curry popularity by appealing to the prejudices or predilections of the news media or any special group by writing a legal opus containing pseudo-erudition on an issue which in any event was wholly unnecessary for a complete determination of this case.

All of the foregoing is apparent from the majority's vapid, meaningless, so-called four-factor test to determine if a defamatory statement is a statement of fact or opinion. Where this issue exists in any libel trial in future cases involving the press as a defendant, the trial judge might as well simply direct a verdict for the defendant, or even better, routinely grant summary judgment motions made by the defense, because, given the result of the case at bar, it is difficult to imagine what otherwise libelous statements of fact will remain actionable once they have been printed in a newspaper.

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[15] Curiously, the majority cites to the dissent of two justices of the United States Supreme Court to the petition for certiorari in *Milkovich* and, *sub silentio*, intimates that this dissent is the law of the case, namely, that *Milkovich* was a public figure. However, the majority opinion conveniently ignores the fact that seven justices of the United States Supreme Court did not share the views about *Milkovich* which were articulated in that dissent.

If the trial judge, perhaps erroneously, concludes that there is a jury issue and tries to frame an understandable jury instruction from the verbal orgy of nonsensical jargon which cascades from the majority's discussion of the spurious four-factor test so as to distinguish fact from opinion, his instruction will likewise probably be deemed nonsense by any reviewing court when measured by the standardless *Scott* case. In that event the appellate court should fashion a rule for jury instruction instead of the vacuous nonsense in the present opinion representing the views of a majority of four.

The standardless four-factor test for distinguishing fact from opinion, as applied here in *Scott*, makes every statement of fact a statement of opinion in every case and therefore not actionable. This is a deprivation of every libeled plaintiff's rights under both the Ohio Constitution and the United States Constitution[16] which provide as follows:

Section 16, Article I, of the Ohio Constitution:

"All courts shall be open, and every person, for an injury done him in his land, goods, person, or *reputation*, shall have remedy by due course of law, and shall have justice administered without denial or delay." (Emphasis added.)

Section I of the Fourteenth Amendment to the United States Constitution:

"* * * [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

If the majority desires to be absolutist (all statements of fact are opinions) with respect to the First Amendment freedom of the press, it should say so, as did the late Justice Hugo Black, instead of foisting upon the public several confusing theories, standards and analyses of legal justification and defense, all of which will obfuscate the law in this area.

[16] The majority opinion says that "[m]isstatements and falsehoods are inevitable in any democratic scheme," and in the same paragraph indicates that such falsehoods are not redressable because of the " 'chilling' effect" such redress would have on "the expression of unpopular statements." That is a strange convolution. Unpopular statements will be and should be protected until they become factual, legally defamatory statements.

Various Materials Submitted for Inclusion in Joint Appendix by Defendants

Defendants' Motion for Summary Judgment and Brief in Support Thereof

(November 8, 1976)

[Included in Joint Appendix at Request of Defendants]

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR., *Plaintiff,*	CASE NO. 75CV0301
	JUDGE JOHN CLAIR
-vs-	
THE NEWS-HERALD, *et al.* *Defendants.*	MOTION FOR SUMMARY JUDGMENT

Now comes The News-Herald, The Lorain Journal Co., and J. Theodore Diadiun, aka Ted Diadiun, Defendants who jointly and severally move this Court for the following Orders in this cause:

1. An Order, pursuant to Rule 56B, Ohio Rules of Civil Procedure, finding that the Plaintiff herein is a public figure and a public official within the meaning of the decisions of the United States Supreme Court in the cases of *New York Times Co. v. Sullivan*, 376 U.S. 254; *Curtis v. Butts*, 388 U.S. 130 and *Time Inc. v. Firestone*, 96 S. Ct. 958.

2. An Order, pursuant to Rule 56B, Ohio Rules of Civil Procedure and pursuant to the decision of the United States Supreme Court in the case of *Gertz v. Welch*, 418 U.S. 323(2), striking from the Complaint the Plaintiff's request for punitive and exemplary damages, and finding that there is no justiciable issue of knowledge of falsity or reckless disregard of trust in this case.

3. An Order, pursuant to Rule 56B, Ohio Rules of Civil Procedure and pursuant to the decree of the United States Supreme Court in the case of *New York Times Co. v. Sullivan*, 376 U.S. 254, decreeing a Summary Judgment in the Defendants' favor and dismissing this action on the grounds and for the reason that there is no genuine issue here as to any material fact, and that each Defendant is entitled to judgment as a matter of law.

This motion is based upon the depositions of Michael Milkovich and H. Don Scott, heretofore filed with this Court in this cause, and upon the affidavits of Theodore Diadiun, Harry Horvitz, James Collins, John W. Saffell, William G. Wickens, Peggy O. Hanrahan, Frank Domokos, B.I. Klepek and James Schonauer with annexed exhibits.

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PROOF OF SERVICE

This will certify that a true copy of the foregoing Motion, with attached Affidavits and Brief, was served upon the Plaintiff by mailing same, ordinary mail, postage paid, to his attorney, Nathan Simon of Mandanici, Domiano, Nuccio and Simon at 1328 Standard Building, Cleveland, Ohio 44113, this 5th day of November, 1976.

William G. Wickens /s/
William G. Wickens

David L. Herzer /s/
David L. Herzer

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR., *Plaintiff.*	)	CASE NO. 75CV0301
	)	JUDGE JOHN CLAIR
-vs-	)	BRIEF OF DEFENDANTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
THE NEWS-HERALD, *et al.* *Defendants.*	)	

I.

This is an action in libel.

The Supreme Court of the United States, in the case of *New York Times v. Sullivan*, 376 U.S. 254 has held that:

> "A State cannot under the First and Fourteenth Amendments award damages to a public official for defamatory falsehood relating to his official conduct unless he proves "actual malice" — that the statment was made with knowledge of its falsity or with reckless disregard of whether it was true or false."
>
> *New York Times v. Sullivan 376 U.S. 254*

In the case of *Curtis v. Butts 388 U.S. 130*, the court applied the same rule to all persons who are public officials or public figures. The United States Supreme Court again held so in *Gertz v. Welch 418 U.S. 323 @ 343*, decided June 25, 1974, and again in *Time, Inc. v. Firestone 96 SCR 958*, decided March 2, 1976.

Therefore, three immediate questions must be resolved:

1. Was Milkovich a public official or a public figure?

2. Did the publication, which is the issue of this case, relate to the plaintiff Milkovich for his action as a public official or public figure?

3. Even assuming the publication to be false, was it published with knowledge of its falsity or in reckless disregard of the truth?

1. The publication here in issue was printed in the January 8, 1975 issue of The News-Herald, a newspaper owned by The Lorain Journal Company of which Harry Horvitz is publisher. The article was written by Ted Diadiun, sports writer.

The articles concerned testimony given by the plaintiff at a trial in Franklin County Common Pleas Court on the subject of a wrestling meet occuring February 9, 1974 between Maple Heights High School and Mentor High School.

The Ohio High School Athletic Assocation had censured the plaintiff Milkovich for his conduct at the meet and had put Maple Heights High School on probation and declared it ineligible for the 1975 state tournament.

Milkovich made no appeal and did not protest the censure, (Milkovich deposition, pages 18-19) but injunction was sought in the Franklin County Court against the Ohio High School Athletic Association (case 74 CV-09-3390) to restrain the enforcement of its 1975 tournament decision. At this court hearing, Milkovich testified and the newspaper item commented on the same. This lawsuit followed.

The incident at the wrestling meet was this: A Maple Heights wrestler fouled his Mentor opponent who was unable to continue; whereupon, the match was awarded to the fouled boy. A near riot ensued, with scores of people from the stands pouring onto the floor and joining the teams in a free for all, with several participants being hurt and taken to hospitals.

Milkovich, as the Maple Heights coach, was definitely involved, having been censured by the Athletic Association for his conduct, and the article related to his conduct and to his court testimony as a coach, teacher, and as a national figure in the sports world.

2. At the times here in question, Milkovich was a teacher in the Maple Heights High School, acting as a coach in its athletic department, and a teacher of driver training. He has been a faculty member since 1950 for 26 years, at a present salary of $17,400.00 per year (Milkovich deposition, Page 5-6).

We submit that under the facts of this case, Milkovich was a public figure within the meaning of the libel laws. One's prominence in the sports world can make one a public figure. *Curtis Publishing Co. v. Butts* (College Athletic director) *388 U.S. 130.*

The deposition of Milkovich shows that he is a national figure, one of America's outstanding wrestling coaches, honored by sports, civic and legislative bodies, with a record unparalleled in Ohio. Some of the highlights of this prominence appear in his deposition at the following pages:

a) Winner of ten (10) Ohio team championships p. 7

b) Seven times runner-up for Ohio team championship p. 7

c) No other teams ever close to his record p. 8

d) Inducted into the National Helms Hall of Fame p. 8

e) National Council of High School Coaches Award p. 9

f) Charter member, Ohio Coaches Hall of Fame p. 9

g) Honored and citation from Ohio House of Representatives p. 9

h) Honored and citation from Ohio Senate p. 9

i) Honored and cited by Council of City of Cleveland p. 10

j) Coach of 450 individual champions p. 10

k) Winner of 16 District Championships p. 10

l) Winner of 8 Sectional Championships p. 11

m) Winner of 20 Cleveland conference championships p. 11

n) Team had 265 victories, 21 defeats p. 11

o) Sixteen (16) seasons without a defeat p. 11

p) Undefeated for 102 consecutive team matches p. 11

q) Honored by City of Maple Heights: Mike Milkovich Day p. 12

r) Speaker at service clubs, high schools, etc. p. 12

s) Subject of articles in national sports magazines: Amateur Wrestling News and Scholastic Wrestling News p. 13

t) Featured subject in Cleveland Magazine, February 1975 issue p. 13

u) Conducts wrestling clinics throughout United States, conducted by State Associations and Coaches organizations p. 15

v) Speaker to Coaches Association throughout United States: North Carolina, Florida, New York, etc. p. 16

w) Conducts wrestling school at Baldwin-Wallace College p. 16

x) Advertises himself and sons in brochure as "Nation's Outstanding Wrestling Family" p. 17

y) Honored at Tucson, Arizona by National College Athletic Association as the "Championship Milkovich Family" March 12, 1976 p. 41

z) Advertises himself as "Ohio's Number One High School Coach" p. 17

It thus conclusively appears that Milkovich is a distinguished and prominent public figure in the world of sports and coaching, and that his responsibilities and activity in the events of February 9, 1974, as determined by the official resolutions of the Ohio High School Athletic Association, were proper bases for the published articles.

3. Since it appears conclusively that Milkovich was and is a public figure and even assuming the publication to be false, the only remaining questions are:

> i) "Was the published article, at the time of publication, known to be false or published in reckless disregard of the truth?
>
> ii) Who has the burden of proof and what are the standards of such proof?"

We will discuss these questions in reverse order.

II.

1. Knowledge of falsity or reckless disregard of the truth must be pleaded and proven by the plaintiff. It is not enough to even allege that defendants published "false, scandalous, malicious and defamatory libel with intent to injure and bring into disgrace". The repetition of adjectives and adverbs is not enough. A factual showing of knowing falsity or reckless disregard is absolutely mandatory, *Suchomel v. Suburban Life Newspapers, 240 N.E. 2nd 1*, and must now be established by deposition or affidavit as provided by Ohio Civil Rule 56.

This requirement must be met by the plaintiff at this time in this proceeding, and if the plaintiff cannot meet it, this action must be dismissed.

While pleadings may properly indicate the claims of a plaintiff, the facts upon which a Motion for Summary Judgment is determined have to be found in filed Affidavits and Depositions.

Ohio Civil Rule 56(C) provides that Summary Judgment may be rendered upon evidence or stipulations, and only therefrom.

Ohio Civil Rule 56(E) expressly states:

> "When a motion for summary judgment is made and supported as provided by this Rule, an adverse party may not rest upon the mere allegations or denials of this pleadings, but his response by affidavit or as otherwise provided in this Rule must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The basic thrust of Rule 56(E) is to require the plaintiff by affidavit or deposition to establish by facts that he has a justiciable issue that warrants a trial. It prohibits him from relying on the allegations of his pleadings. (Milligan, Ohio Forms of Pleading and Practice, Vol. 5, 56-43). Conclusions of falsity, knowledge, or reckless disregard become insufficient.

2. It is here and now incumbent upon the plaintiff to prove by clear and convincing evidence that the defendants, when making this

publication, had serious doubts as to its truth. The defendants must be shown to have a "high degree of awareness of the probable falsity" of the publication. We will hereafter cite the authority of the United States Supreme Court that this is the true rule.

Therefore the truth or falsity of the publication is Not the test, but, rather, whether the defendants were aware that the publication was false. This is the sole test, as we will demonstrate.

> "To insure the ascertainment and publication of the truth about the public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones."
>
> *Rosenblum v. Metromedia*, 403 U.S. 29

3. Not only must the plaintiff bear the burden of proving falsity or reckless disregard, but the plaintiff, to maintain his action, must do so by clear and convincing evidence. This is the clear rule of *Rosenblum v. Metromedia.*, 403 U.S. 29 @ 52, decided June 7, 1971.

4. Proof of a false or erroneous statement, in a case such as this, is not sufficient.

> "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the proof of his publication."
>
> *Amant v. Thompson, 390 U.S. 727, 731*

The Supreme Court has held that in such cases plaintiffs are:

> "permitted to recover in libel only when they could prove that the publication involved was deliberately falsified or published recklessly despite the publishers awareness of probable falsity."
>
> *Curtis Publishing Co. v. Butts, 388 U.S. 130,135*

In another case, the highest court, in interpreting the Constitution said:

> "Only those false statements made with a *high degree of awareness of their probable falsity* demanded by 'New York Times' may be subject to either civil or criminal sanctions."
>
> *Garrison v. Louisiana, 379 U.S. 64, 74*

5. What is "reckless disregard" that is so often referred to in the opinions of the courts?

The Court has come close to a definition where it said:

> "These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion *that the defendant in fact entertained serious doubts as to the truth of his publication*. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."
>
> *St. Amant v. Thompson, 390 U.S. 727, 731*

> "In New York Times, supra the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware the the likelihood that he was circulating false information."
>
> *St. Amant v. Thompsom, 390 U.S. 727, 731*

Hence, reckless disregard also requires proof of an awareness of a likelihood of falsity.

Beckley Newspapers v. Hanks, 389 U.S. 81 @ 84

Hence, lack of adequate investigation is no proof of reckless disregard.

Gertz v. Welch, 418 U.S. 323 @ 332. Beckley Newspapers v. Hanks, 389 U.S. 81 @ 84-85

From these cases it clearly appears that for this court to deny this motion it must find from the affidavits and depositions that the defendants at the time of publication "entertained serious doubts as to the truth of the publication," and the court can come to such conclusion only after clear and convining proof.

We are certain that the Court can reach no such conclusion from anything that will be submitted in connection with this motion.

III.

Having discussed the law by which the facts will be weighed we turn to the evidence submitted with this Motion.

1. In the hearing in the Franklin County Common Pleas Court, Mr. Milkovich repeatedly testified that during the wrestling meet he did not see any fighting of any kind:

Q. Was there a scuffle of any kind?

A. I saw a mass of people.

Q. You saw a mass of people?

A. Yes.

Q. Were the wrestlers involved in that mass?

A. Some of them were over there, yes.

Q. You did not see any fighting of any kind?

A. No.

* * *

Q. Did you do or say anything to cause, incite a riot in that gymnasium?

A. No.

Q. Did you do your best to quiet the crowd?

A. Yes.

Q. You separated, you tried to separate the participants in this incident?

A. Yes.

Q. As far as you know, you didn't see any punching or fighting?

A. I didn't see anything. (Exhibit A)

The fact is that at all times he was in the midst of fighting where many were injured and four sent to the hospital. See attached Exhibits B, C, D, E, F and G. He must have seen what was occuring all about him. Milkovich is shown in the pictures by an arrow.

The foregoing testimony of Milkovich (Exhibit A) was the subject of the publication, given on November 8, 1974, and believed in substance by Diadiun when he wrote the article of January 8, 1975.

Diadiun had attended the wrestling meet, had witnessed the riot and Milkovich's conduct thereat, and as appears by his affidavit (Exhibit M), he believed the sworn testimony of Milkovich to be false.

The honesty of his belief is evidenced by his affidavit (Exhibit M) and the attached photographs of the scene showing Milkovich in the midst of a riotous mass (Exhibits B, C, D, E, F and G).

2. In his sworn testimony at the trial, Milkovich testified that during the altercation he saw no fighting and did nothing to incite the crowd or cause a riot. (Exhibit A, Page 16). He portrayed himself as a bystander who saw nothing, and did nothing except to separate participants and call for order.

In his filed deposition, page 32, Milkovich, in support of his court testimony, further said:

Q. "Did you make any gestures and wave your hands?"

A. "No."

Q. "You never raised your arms?"

A. "No."

Diadiun, who attended the meet and observed the action, has by affidavit stated his bonafide belief that Milkovich's testimony was false, upon which belief he based his publication. (Exhibit M).

The honesty of his belief is evidenced by the photographs of the scene showing Milkovich in the midst of the action with arms raised high in excitement as he joined in the demonstration.

As Diadiun wrote the article of January 8, 1975, he knew the contents of the letter of censure addressed to Milkovich on March 5, 1974 (Exhibit H) wherein the Commissioner of the Ohio High School Athletic Assocation, after hearing, ruled that:

> "From the reports studied by the State Board, they were of the unanimous opinion that you were *derelict in your responsibility* to insure that members of your wrestling team conducted themselves in the way high school athletes are expected to. There was a distinct feeling that if you had taken proper precautions, your team would not have become involved with the Mentor High School wrestlers. Coaches have a great responsibility in crowd control and it all begins with, first of all, *controlling yourself and members of your team* and if this is done in a proper manner, crowd control then becomes a very minor problem." (Emphasis added)

Hence, the State Board attributed the altercation to the failure of Milkovich to control himself and his team.

This finding conformed with a prior informant's statement to Diadiun that Milkovich customarily controlled the Maple Heights fans by the use of his hands as a conductor directs an orchestra.

3. Despite the sworn testimony of Milkovich, it appears that the actions and conduct of Milkovich were the very thing that put the crowd in a fighting mood.

This began as the fouled boy lay on the mat, unable to continue.

Milkovich represents his conduct as being passive and sportsmanlike. He denies a demonstration by gestures or otherwise. In his deposition (page 27) he testified:

Q. You thought he could get up?

A. Yes.

Q. You made it known that you thought so, didn't you?

A. What do you mean, I urged him?

Q. You said, you can wrestle, get him up, or words to that effect, did you not?

A. (At this time the witness shook his head)

Q. You say you didn't urge him to get up?

A. No.

Q. You didn't wave your arms?

A. No.

* * *

At page 29 Milkovich repeated:

Q. For the record, you have your two hands out, and you are merely pushing them down to the floor. Is that the only motion you made at that time and place?

A. Yes.

Q. You didn't make any gestures indicating disbelief in his injury?

A. No.

Q. You didn't make any gestures here for him to get up, and to come on?

A. No.

Obviously, Diadiun had grounds to believe such pretenses to be false.

In addition to witnessing the scene as stated in his affidavits, Diadiun had contrary statements from other witnesses and contrary findings from other investigations, on which he could form a reporter's judgment.

He had been informed by the principal of Mentor on February 14, 1974 (Exhibit I):

> "The Maple Heights Coach said, "Jim, the boy's not hurt. Put him back and make him wrestle." He did not examine

the wrestler. He then turned away, demonstrably threw up his hands in obvious gesture of disgust, and said to the Mentor coach and the injured wrestler, "Schonauer, if you want the God damn match that bad, then take it." At this point the crowd was in an uproar."

The Athletic Director at Mentor saw it all and reports Milkovich's conduct as follows:

"Mr. Milkovich did throw up his arms in disgust when Coach Schonauer indicated that the injured wrestler, Paul Pochatica, could not continue the match. His gestures had the crowd in an uproar. For about ten minutes no attempt was made by the Maple Heights coaching staff to bring the situation under control. No one on the staff attempted to speak to the crowd or to quiet them and restore order. After various conferences with the staff of both schools, the teams returned to the gym, at which time Mr. Milkovich Sr. used the public address system for the first time."

(Exhibit J)

B. J. Klepek, a witness to the wrestling match, told Diadiun prior to the publication:

"It was while the injured Mentor boy was being administered to that Coach Milkovich, the head coach, strutted and gestured around the mat to show his displeasure and to indicate from his observation nothing was wrong with the injured wrestler...Coach Milkovich's gesturing and hand actions, in my opinion, incited the crowd and his wrestling team to the point where a few members of Maple's squad lashed out and started swinging at some members of the Mentor squad. A riot followed."

(Exhibit K)

Prior to the publication of the Diadiun article in the News Herald, the principal of Mentor High School had told him of a call she had had from the principal of Maple Heights, which was Milkovich's school:

"This conduct by Mike Milkovich was confirmed on Monday by William Cain, principal of Maple Heights High School. He called me and said that he had told the Maple Heights varsity coach that his gestures led the spectators to assume that the Mentor wrestler was not hurt. He also said that he heard the Mentor acting athletic director tell the Maple coach that he should attempt to quiet the spectators. Mr. Cain said that he regretted the incident and that it was Maple's fault that the Mentor wrestlers were hurt...I discussed the foregoing in substance with Ted Diadiun, a newspaper reporter, when interviewed in February, 1974."

(Exhibit I)

The fact that Milkovich caused the uproar by his gestures and conduct is attested by these and other reports which came to Diadiun. (Exhibit M)

In his testimony, (Exhibit A, Page 9), Milkovich testifed in court that when the injured wrestler stood up, his coach told him to lay down. The Mentor coach in our Exhibit Q, emphatically denied the truth of that sworn testimony as Diadiun well knew when he wrote the article.

These affidavits as well as what he saw (Exhibit M), establish that Diadiun had reason to believe the truth of his publication.

We are confident that the plaintiff cannot produce a scintilla of evidence that Diadiun or the News Herald had a "serious doubt" as to the truth of the publication, which fact the plaintiff must now establish by clear and convincing evidence if this motion is to be denied. *St. Amant v. Thompson*, 390 U.S. 727, 731.

Certainly it is clear that the defendants here, including the newspaper corporation and its publisher, entertained no doubts as to the truth of the publication. Hence, there can be no actionable libel under the law of *New York Times v. Sullivan*. The plaintiff just cannot show that the defendants had any such doubts by clear and convincing evidence, which is his burden, and which doubts never existed.

4. There is no justiciable issue, no province for the deliberation of a jury when the facts establish, as a matter of law, that the plaintiff is a public figure and that there is no clear and convincing proof that the defendants entertained "serious doubt" as to the truth of the publication.

5. Although we assert that it is clear, as a matter of law, that the plaintiff is a public figure, nevertheless even though the court were to conclude otherwise, the plaintiff's request for punitive damages should be stricken, as no more than compensatory damages may be obtained in any case.

> "The States may not permit recovery of presumed or punitive damages when liability is not based on knowledge of falsity or reckless disregard for the trust, and the private defamation plaintiff who establishes liability under a less demanding standard than the New York Times test may recover compensation only for actual injury."
>
> *Gertz v. Welch*, 418 U.S. 323 @ 324

> "We hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."
>
> *Gertz v. Welch*, Supra, @ 329

> "The largely uncontrolled discretion of juries to award damages when there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms."
>
> *Gertz v. Welch*, Supra, @ 349

Here the plaintiff has sustained no compensatory damages, and urges his case on the forbidden ground of presumed damages.

His filed deposition shows:

a) The censure from the State Board together with his picture therein captioned "censured", had been published previously in newspapers and he had no way of evaluating its effect. 21-22

b) For none of the publicity was he ever fired by the School Board. 22

c) In fact, after the publicity he got a raise in salary. 6

d) After the publicity the community rallied to his support and raised over $4,000.00 for the court appeal — spaghetti dinners, raffles, paper drives, etc. and a donation of $100 by local American Legion and donations by others. 22-27

e) Milkovich testified, "The community stood behind us regarding this lawsuit." 23

f) He attributes no loss of salary to the publication. 35

g) In 1975, after the publication he was invited to speak at 3 wrestling clinics, being the same as in prior years. 36

h) He knows of no specific wrestling clinics that did not engage him because of the publication. 37

i) He has been embarrassed by questions about the altercation, but such questions could have arisen from the prior censure publicity. 37

j) The defendant newspaper was not responsible for the letter of censure. 37

k) He can think of nothing specific that he has lost by reason of the January 1975 publication in the News Herald. 38

l) He can think of no losses he had had, no cancellations he has suffered, no employments or payments he had lost, and of no one who has dropped him because of the News Herald article. 38

Any recovery here must be based on presumed or nominal damages, and this is expressly prohibited by the Supreme Court in the *Gertz* case, supra, @349, which is cited above.

Hence, no justiciable issue exists, and a Summary Judgment of dismissal should be entered in this case, even if the plaintiff were not a public figure.

Under former law, some damages were presumed in cases of libel *per se*. Such is no longer true, except upon proof of known falsity or reckless disregard, which is absent here.

> "One clear result of the Gertz decision is that a plaintiff may no longer rely on the doctrine of libel per se as it was heretofore recognized in Ohio, to form the basis of a libel suit."
>
> *Maloney v. Scripps, 43 Ohio App. 2nd 101 @ 109.*

IV.

Whether a plaintiff is a public official or a public figure is not a jury question.

> "In a libel case arising out of newspaper comment, it is for the trial judge in the first instance to determine whether the proofs show the plaintiff to be a public official or public figure."
>
> *Rosenblatt v. Baer 383 U.S. 75 @ 88*

V.

The court has no justiciable issue before it and summary judgment should be entered on these facts for the defendants as a matter of law.

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John I. Hurley, Jr. /s/
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Painesville, Ohio 44077
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Attorneys for Defendants

EXHIBIT A

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

PATRICK J. BARRETT, *et al.*,) CASE NO. 74CV-09-1300
Plaintiff,)
)
-vs-)
)
OHIO HIGH SCHOOL)
ATHLETIC ASSOCIATION,)
Defendant.)
)

EXTRACT OF TESTIMONY

of Mr. Mike Milkovich from the notes and comparison to transcript from said notes as recorded during the hearing of this matter before the Honorable Paul W. Martin, Judge, beginning on November 8, 1974.

APPEARANCES:

Mandanici, Domiano, Nuccio & Simon, Attorneys at Law, 1328 Northern Ohio Bank Building, Cleveland, Ohio, by Mr. Nathan Simon and Mr. Michael J. Occhionero, of Counsel,

On behalf of the Plaintiffs.

Henry Maser and Carlisle O. Dollings, Attorneys at Law, One Livingston Avenue, Columbus, Ohio,

On behalf of the Defendant.

* * * * *

hand across the back of the head and the referee penalized and justifiably so the Maple Heights boy.

The Mentor boy stood up and the — I think the coach called for time out and told the boy to lay down.

Then you could hear a sort of rumbling in the fans, a reaction from the fans. Then, I think, I waited for about two minutes because the rule book says three minutes for an injury. I went out to check on the boy.

The coach say, "He is not going to wrestle. My boy is hurt."
I said, "Fine." I says, "Take your 6 points and let's bring on the next match" and I was outside of the 10-foot circle and I montioned for the 165 pound class to come on.

Then I looked over my right shoulder and I saw an altercation going on at the Mentor bench.

Q. When you saw this altercation taking place, what did you do, if anything?

A. I walked over. You see, some people were getting out of the stands. I said, "Go back and sit down." It seemed to me that it lasted maybe five, ten seconds, no longer. We pushed the people back and they sat down. The referee left and then the superintendent and the —

Q. Which superintendent?

A. Don Scott, our superintendent and the athletic director met with the coach, the — I believe the athletic director from Mentor and said that I should go on the PA System and say that if we had anymore of this that we would clear the gym and wrestle without any fans.

Q. Mr. Milkovich, where were you standing when this altercation as such occurred?

A. I was standing in front of my bench.

Q. Describe to the Court where your bench is in relation to where the Mentor coach was and where the altercation took place?

A. The bench was probably — our bench is separated by about six or seven feet. I'm not sure. There is a separation. We have benches that we use in football and we move them on to the corner of the wrestling mat and the wrestling mat is about 42 by 40.

Q. Assume this is the wrestling room. If you will just give the Court some idea what is happening — this is the wrestling mat itself, here. Where is the Maple Heights bench in relation to this as being the room?

A. The Maple Heights mat would be right here or the match would be going on there. The contestants of Maple Heights were here and the Mentor team would be in the position of this bench right here.

Q. So the Mentor team was here?

A. Yes.

Q. And the Maple Heights team, where were they in relation —

A. Right here.

Q. Over there. That position.

A. I stood in front of the bench.

Q. The wrestling mat is out there?

A. Yes.

Q. Where were you standing when this altercation took place?

A. I must have been about 10, 15 feet away from my bench, but in front of it.

Q. This is your bench? Where would that be? Over there?

A. No, sir. I would be standing right here. The referee was right by — in here.

Q. Let the record show that Mr. Milkovich is pointing to an area approximately in front of the Maple Heights bench, is that correct?

A. Yes.

Q. About 10 feet. Now, Mr. Milkovich, when this altercation occurred, what in fact did you see or observe or have first-hand knowledge as relates to the participants?

A. I didn't see the boy throw a punch.

Q. When did the boy punch the Mentor boy.

A. I didn't see any of this.

Q. I see.

A. The only thing I saw is when they started to fight I got a hold of some fans and told them to go on back into the stands. I started pushing them back.

Q. Were the fans unruly at that point?

A. No, not up until that point. As a matter of fact, I could not say it was Maple Heights fans because the Maple Heights fans — over to the left Mentor was out to the — right behind their bench.

Q. Were the Mentor fans unruly?

A. Up until that point?

Q. Yes.

A. No.

Q. Were they at the point of the altercation?

A. I would say they were highly vocal, made remarks.

Q. Were the Maple Heights fans doing the same thing?

A. There was much cheering going on during the wrestling match — nothing unruly, not from Maple Heights.

Q. In back of the Maple Heights bench which is approximately, for the Court's information, about where you are standing, was there a crowd there?

A. There might have been two or three people back there.

Q. Do the rules of High School Athletic Assocation provide or require or prohibit fans from being present at your bench?

A. I don't know. I have raised the question. In tournaments there is no place for a coach or a team that is separate because there are so

many teams. There is no place in our conference where we have a place to sit. You sit in the front row with the fans in back of us. However, we provided a separate area for our wrestling team and visitors.

Q. Mr. Milkovich, would you tell the Court exactly what is meant by altercation? What actually took place? What is the altercation we are talking about that took place at this bench?

A. First of all the altercation occurred after we were penalized a point for unnecessary roughness. Then when the coach told this boy — -

Q. Which coach?

A. The Mentor coach, Jim Schonauer and he didn't want his boy to continue. That meant they picked up six points. Then as kids often do there are remarks back and forth on the benches. They said, "We got six easy points" and I guess words were exhanged. This is what I learned after I quizzed the kids.

Q. Was there an actual fight?

A. I could not tell. I didn't see it.

Q. I see. Did you see anything at all, unruliness or disruptive on Maple Heights or Mentor's part between the respective wrestlers?

A. No.

Q. Was there a scuffle of any kind?

A. I saw a mass of people.

Q. You saw a mass of people?

A. Yes.

Q. Were the wrestlers involved in that mass?

A. Some of them were over there, yes.

Q. You did not see any fighting of any kind?

A. No.

Q. What was your reaction to this altercation. What did you do?

A. After we settled the fans I got on the microphone and told the fans that if we had anymore of this we would clear the gym and have the wrestling match without any fans.

Q. Did the crowd quiet down?

A. They quieted down and were well behaved. It was just a perfect match.

Q. Now, what was the referee at the point?

A. Frank Fiore. F-i-o-r-e.

Q. Did Mr. Fiore censure you in any way. What was his reaction to this?

A. None at all. I have known Frank for well over 20 years as a coach and official in tournaments and matches. We have never had anything but the finest of rapport.

Q. Did Mr. Fiore censure you in any way for your

* * * * *

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO

PATRICK J. BARRETT, *et al.*, *Plaintiff,*	)	CASE NO. 74CV-09-1300
-vs-	)	
OHIO HIGH SCHOOL ATHLETIC ASSOCIATION, Defendant.	)	

AFFIDAVIT

I, John W. Saffell, Assistant Official Court Reporter in the Court of Common Pleas of Franklin County, Columbus, Ohio, being first duly sworn, state that I was the duly appointed Court Reporter to record the hearing of the above matter before the Honorable Paul W. Martin, Judge, in its entirety;

That the attached Extract of Testimony has been extracted from my stenotypy notes and compared with the official transcript having been filed in the Franklin County Court of Appeals;

That the attached Extract of Testimony is a true and accurate transcript thereof.

John W. Saffell /s/

John W. Saffell, Assistant
Official Court Reporter.

Sworn to before me and signed in my presence at Columbus, Ohio, on this 1st day of November, 1976,

My commission expires
20 August 1978.

Christine M. Taylor /s/

Christine M. Taylor, Official
Court Reporter.

EXHIBIT H

cc William Cain, Principal, Maple Heights
Mrs. Peg Hanrahan, Prin. Mentor
Ernest A. Zimmerman, Prin. Eastlake North

Mr. Michael Milkovich Sr.
Wrestling Coach
Maple Heights High School
5500 Clement Drive
Maple Heights, Ohio 44137

Dear Mr. Milkovich:

I have been instructed by the State Board of Control of the Ohio High School Athletic Assocation to write to you regarding the incident that happened at your wrestling match with Mentor High School.

From the reports studied by the State Board they were of the unanimous opinion that you were derelict in your responsibility to insure that members of your wrestling team conducted themselves the way high school athletes are expected to. There was a distinct feeling that if you had taken proper precautions your team would have not become involved with the Mentor High wrestlers.

Coaches have a great responsibility in crowd control and it all begins with, first of all, controlling yourself and members of your team and if this is done in a proper manner crowd control then becomes a very minor problem.

We sincerely hope that your fine record at Maple Heights, as a wrestling coach, will be further exemplified in your young athletes as good wrestlers and most importantly, good sports.

Sincerely yours,

Dr. Harold A. Meyer
Commissioner

HAM:ha
March 5, 1974

EXHIBIT L

For MAY, 1974

BOARD MINUTES

February 28, 1974

The State Board of Control of the Ohio High School Athletic Association conducted the regular monthly meeting on February 28, 1974 in the Association office in Columbus, Ohio.

Board members present were: Blair Irvin, President; Duane Bachman, Vice President; Dana Auckerman; James Burrier; Alfred Lopez; John Wickline; Robert L. Holland, State Department of Education, Ex-Officio; Dr. Harold A. Meyer, Commissioner; George D. Bates, Associate Commissioner; Fred. L. Daller, Assistant Commissioner; Dolores A. Billhardt, Assistant Commissioner and Richard L. Armstrong, Executive Assistant.

Others present were: Ted Federici, representing the OHSFCA; Charlotte Basnett, DGWS; Bernadine Reinhardt, OHSAA Girls Advisory Committee; Ned Forman representing BASA; Dick Sherman representing OHSADA; George Strode, AP; Fred Church, representing OHSBA; Frank Sellers, Scripps-Howard; Michael Milkovich, Maple Heights High School; T. "Doc" Wylie, Athletic Director, Maple Heights High School; Mike Milkovich, Jr., Maple Heights High School; William Cain, Principal, Maple Heights High School, H. Don Scott, Superintendent, Maple Heights High School; Doug McCormick, Scripps-Howard; Frank Domokos, Athletic Director, Mentor High School; Peggy Hanrahan, Principal, Mentor High School; Jim Schonauer, Wrestling Coach, Mentor High School; John Goodwin, Mentor High School; Dave Clinefelter, Mentor High School; Ted Diadiun, Willoughby News Herald; Gene Schmidt, Mayfield High School; Don Drebus, Willoughby South High School; Charles Grottenthaler, Superintendent, Mentor School District; May Crosten representing OATCCC and Bob Whitman, Columbus Citizen Journal.

* * * * *

Maple Heights Wrestling Team
Placed on Probation

Moved by Duane Bachman, second by Al Lopez that effective March 1, 1974 the Maple Heights High School wrestling team be placed on probation until the end of the 1975-76 school year and be declared ineligible for the 1975 OHSAA state sponsored Wrestling Tournament. Letters of severe censure are to be sent to the Varsity and Junior Varsity Wrestling Coaches at Maple Heights and copies of the letters are to be forwarded to the Administrative head of the school. The Maple Heights High School Principal is to re-evaluate the entire wrestling program to insure the safety of participants and spectors at all wrestling meets. Unanimously carried (Newspaper men present agreed to a Friday, March 1, 1974, 10:00 A.M. release time to permit OHSAA to notify schools of decision.)

Adjournment

* * * * *

EXHIBIT Q

In my ten years of coaching I have never, ever told a boy to lay down. Certainly, I believe this is unethical and Mr. Milkovich's charges to this effect in the various papers and as he has indicated in the court proceedings in Franklin County are completely false and I resent it very much.

I feel very, very strongly that Mr. Milkovich's actions and the actions of his son, Mike Jr., who is the assistant coach, caused the incident to break out, and certainly he could have prevented this from happening with different actions.

I have discussed the above matters several times with writer Ted Diadiun prior to the publication of the article in January of 1975.

James M. Schonauer /s/

James Schonauer, Mentor
Wrestling Coach

Sworn to before me and subscribed in my presence this 10th day of June, 1976.

James K. Collins Jr.

Notary Public

James K. Collins Jr., Notary Public
Lake County, Ohio
My Commission Expires Mar. 16, 1981

EXHIBIT I

STATE OF OHIO	)	IN THE COURT OF
	) SS:	OF COMMON PLEAS
LORAIN COUNTY	)	LAKE COUNTY, OHIO
	)	CASE NO. 75-CIV-0301
MICHAEL MILKOVICH, SR., *Plaintiff,*	)	
-vs-	)	AFFIDAVIT OF
THE NEWS-HERALD, *et al.* *Defendants.*	)	*PEGGY O. HANRAHAN*

I am the Principal of Mentor High School.

The following is a statement of my investigation of the Mentor-Maple Heights scheduled wrestling match held at Maple Heights High School on Staurday, February 9, 1974.

At this match, three Mentor wrestlers were injured by Maple Heights wrestlers and spectators.

This report is a chronological sequence of events prior to, during, and following the melee in which the injuries were sustained. The information contained in this account was obtained by me from personal interviews I conducted with Mentor school personnel who were present at the wrestling match and is true to the best of my knowledge and belief. The Mentor school personnel with whom I consulted were: James Schonauer, varsity coach; John Goodwin, assistant varsity coach, David Clinefelter, junior varsity coach; Frank Domokos, acting athletic director. Mr. Schonauer and Mr. Goodwin were seated with the varsity team, Mr. Clinefelter with the junior varsity team while Mr. Domokos was seated in the visiting team bleachers.

At the conclusion of the 145 pound bout, the Maple Heights' wrestler twice refused to shake hands with the Mentor wrestler, and the referee asked him to comply with the end of the match procedure. At the insistence of the referee, the Maple Heights wrestler finally shook the Mentor wrestler's hand.

In the middle of the third period of the 155 pound match, the Mentor wrestler was hit on the back of the head with a forearm; the Maple Heights wrestler was called for unnecessary roughness and penalized by the referee. The Mentor wrestler was injured by the blow and was assisted to the side of the mat by the Mentor varsity coach and trainer. At this time, the Mentor coaches asked for a doctor and found that none was available; therefore the wrestler was treated by the coach and trainer. During the allotted three minute medical time out, the Maple Heights junior varsity coach left the junior varisty team, which was at the opposite end of the gymnasium, went to where the Mentor wrestler was lying, and yelled, "Make the kid wrestle. That's a cheap way to get six points." The referee waved him back to the Maple Heights side of the varsity mat, where he talked to the Maple Heights varsity coach, Mike Milkovich.

Subsequently, he returned to the area in front of the Mentor bench on at least two different occasions and he indicated to the Mentor team, "That's the only way you will win a match here."

As stated in Rule 8-2-1 of The National Federation Rule Book with comments on page 32, when no physician is present, the coach must determine whether a wrestler is fit to continue the match. The Mentor coach applied the standard fitness tests, and determined that the wrester could not count fingers nor grasp, with any strength, the coach's hand. To secure a further opinion on the boy's fitness to continue, he called the Maple Heights coach over to where the Mentor wrestler lay. Upon his arrival, Mike Milkovich said, "Jim, the boy's not hurt. Put him back and make him wrestle." He did not examine the wrestler. He then turned away, demonstrably threw his hands up in obvious gesture of disgust, and said to the Mentor coach and in the injured wrester, "Schonauer, if you want the God damn match that bad, then take it." At this point, the crowd was in an uproar. During the medical time out, the 155 pound Maple wrestler walked around the mat, throwing his head gear on the floor, gesturing wildly with his arms and shouted. Also, during this time, the Maple Heights wrestler taunted the Mentor team with such statements as: "Fish", "Fairy",

"Fag", "Pussy", and "Throw him out. He's not hurt." After the three minute time out, the Mentor coach determined that the wrestler was not physically able to particpate, and so informed the referee. Both 155 pound wrestlers then approached the center of the mat for the end of the match procedure.

At this time, the Maple Heights wrestler threw his helmet, kicked it off the mat, and shouted with arm gestures. The Maple Heights junior varsity coach and another person who was sitting at the Maple bench were at this time physically holding back an unidentified man at the Maple Heights varsity bench. Many Maple Heights spectators were on their feet in front of the stand shouting and gesturing.

The referee awarded the match to the Mentor wrestler by default, and both teams started to return to the bench. The Mentor wrestler had to be helped to the bench by the coach.

At this point, at least two Maple Heights wrestlers ran across to the Mentor bench and began to hit Mentor wrestlers with their fists. One Mentor wrestler sustained a cut lip which required three stitiches. Then Maple wrestlers and spectators came across the mat, out of the adjacent bleachers, and from behind the Mentor bench attacking the Mentor wrestlers. In addition, a portion of the unsupervised Maple Heights junior varsity wrestlers ran to the varsity end and joined the melee. Two other Mentor wrestlers were injured. Both were struck in the head with the heel of a platform shoe, being used as a club by a spectator. One was rendered unconscious, and the other sustained head lacerations which required stitches. Other members of the team were hit by spectators, but did not require medical attention. One Mentor cheerleader was struck in the abdomen by a spectator.

The police within a few minutes had everyone away from the Mentor wrestlers. The Mentor coaches determined that several wrestlers needed medical attention and asked for an ambulance, which arrived shortly. Four Mentor wrestlers were taken to Suburban Community Hospital, treated, and released.

For approximately ten minutes, no attempt was made by the Maple Heights coaching staff to help bring the situation under control. No one of the staff attempted to speak to the crowd or to quiet it and

restore order. During this time, the Maple Heights athletic director and varsity coach took the Mentor acting athletic director and varsity coach into an office, and relayed a message from the referee that he would continue the match only if the gym were cleared of spectators. The Maple Heights varsity coach suggested that the referee be asked to continue the match with spectators present. A Maple Heights representative added the stipulation that if there were any further outbreak, the gym would be cleared of spectators.

The Mentor acting athletic director and varsity coach returned to the Mentor team to assure their safety and did not talk to the referee.

All team members of both schools had at this time returned to their respective benches. The Maple Heights varsity coach used the public address system for the first time, and told the spectators that the match would continue only if they behaved in an appropriate manner.

After the melee, during the 175 pound bout, a Maple Heights wrestler stood behind the Maple Heights bench shouting obscenities. No attempt was made by the Maple Heights coaching staff to control him. It should be noted that Mentor had to forfeit the 185 pound bout as the 185 pound wrestler was at the hospital for treatment of injuries sustained in the melee.

The Mentor team and coach were badgered and heckled throughout the evening by spectators sitting beside the Mentor bench. These remarks built in intensity prior to and during the 155 pound bout. There were three unauthorized people on the Maple Heights bench during the entire match. One unidentified person who was in the vicinity of the Maple bench the entire match had to be restrained from approaching the mat during the 175 pound bout by the Maple Heights varsity coach.

The Mentor school personnel believe that the conduct of the Maple Heights' varsity and junior varsity coaches contributed to the reprehensible behavior of the spectators. The junior varsity coach left his team and both coaches left the team benches. This conduct by Mike Milkovich was confirmed on Monday by William Cain, Principal of Maple Heights High School. He called me and said that he had told the Maple Heights varsity coach that his gestures led the spectators to assume that the

Mentor wrestler was not hurt. He also said that he heard the Mentor acting athletic director tell the Maple coach that he should attempt to quiet the spectators. Mr. Cain said that he regretted the incident and that it was Maple's fault that the Mentor wrestlers were hurt.

The physical condition of the injured wrestlers was checked and copies of the hospital reports made for filing. The treatable injuries were:

1. One student receiving head laceration requiring sutures and was X-rayed for possible concussion.

2. One student received a lip laceration and required sutures.

3. One student who was rendered unconscious was X-rayed for a possible concussion.

I discussed the foregoing in subtance with Ted Diadiun, a newspaper reporter, when interviewed in February 1974

The foregoing information, obtained from personal interviews with Mentor school personnel who were present at the wrestling match, is true to the best of my knowledge and belief.

Peggy O. Hanrahan /s/

PEGGY O. HANRAHAN
Principal, Mentor High School

SWORN TO AND SUBCRIBED BEFORE ME in my presence by the said Peggy O. Hanrahan, personally known to me, this 15th day of September, 1976.

Betty A. Ficke /s/

Notary Public

Betty A. Ficke, Notary Public
Lake County, Ohio
My Commission Expires April 15, 1977

EXHIBIT J

MENTOR PUBLIC SCHOOLS

Mentor High School
6477 Center Street
Mentor, Ohio 44060
255-4444

August 4, 1976

To Whom It May Concern:

In my conversations with Ted Diadiun of the News Herald Sports Department concerning the Mentor-Maple Hts. wrestling match, I believe that the incidents of the Maple Hts. — Mentor wrestling match of February 9, 1974 as reported in the News Herald were accurate and truthful.

Mr. Milkovich did throw up his arms in disgust when Coach Schonauer indicated that the injured wrestler, Paul Pochatica, could not continue the match. His gestures had the crowd in an uproar.

For about ten minutes no attempt was made by the Maple Hts. coaching staff to help bring the situation under control. No one on the staff attempted to speak to the crowd or to quiet them and restore order.

After various conferences with the staffs from both schools, the teams returned to the gym, at which time Mr. Milkovich Sr., the Maple Heights varsity coach, used the public address system for the first time and told the spectators that the match would continue if they behaved in an appropriate manner. The match was then started and concluded.

Signed in my presence this
10th day of August, 1976.

Frank Domokos /s/

Frank Domokos
Athletic Director
Mentor High School

Grace Salter /s/

Notary Public

Notary Public for Lake County, Ohio
My Commission Expires May 20, 1977

FD/cjs

EXHIBIT K

To Whom It May Concern:

On Saturday night, February 9, 1974, I witnessed the Maple Heights-Mentor wrestling match.

Maple was beating Mentor rather handily 27-10 when the Pochatila-Gerardi match started. The Maple wrestler was winning when in nis desire to pin the Mentor wrestler he hit *Pochatila* in the back of the neck or head and the boy went to the mat — flat.

It was while the injured Mentor boy was being administered to that Coach Milkovich, the head coach, strutted and gestured around the mat to show his displeasure and to indicate from his observation nothing was wrong with the injured Mentor wrestler.

After a bit, the Pochatila boy got up, walked around and again was laid on the mat. Both Milkoviches came over and seemed to be complaining and the older Milkovich walked away in a huff, throwing up his hand indicating his disgust at the boy stretched out on the mat.

Coach Milkovich's gesturing and hand actions, in my opinion, incited the crowd and his wrestling team to the point where a few members from Maple's squad lashed out and started swinging at some members of the Mentor squad.

A riot followed.

Not until the police had squelched the pandemonium and after several Mentor wrestlers were taken to the hospital, did Coach Mike Milkovich do anything constructive in trying to calm anybody down. He did get on the P.A. and help to restore a calmer attitude to the crowd, but it was far too late, the damage had been done. His actions helped to get the crowd and this team riled up.

B. J. Klepek /s/

B. J. Klepek

Grace Salter /s/ - 06/17/76

Grace Salter
Notary Public for Lake County, Ohio
My Commission Expires May 20, 1977

EXHIBIT M

AFFIDAVIT OF THEODORE DIADIUN, AKA TED DIADIUN

Theodore Diadiun, being first duly sworn, deposes and says as follows:

1) I am a reporter for the News-Herald and a defendant in this action. I wrote the article published in the News-Herald on January 8, 1975, which is the subject of this action, and I believed the same to be true and had no doubt as to its truthfulness.

2) I attended the wrestling meet between Maple Heights High School and Mentor High School on Feburary 9, 1974, at which time, in a 155-pound match, I saw a Maple Heights wrestler, Bob Girardi, foul a Mentor wrestler by the name of Paul Pochatila.

As the injured boy lay on the mat, the Maple Heights coach, Mike Milkovich, threw up his arms in disgust and visibly indicated his belief that the boy was not hurt and indicated his disgust at the boy stretched out on the mat.

At these gestures, and at his visible demands upon the Mentor coach that the boy get up and wrestle, the crowd began to holler and roar, imitating the gestures made by Milkovich with arms waving. In this commotion and upon the awarding of the match to Mentor by the referee with continued demonstration of disgust by Milkovich, some Maple Heights wrestlers left their benches and attacked the Mentor team. A riot followed with spectators flowing onto the floor, shoving, pushing, and punching.

For about two minutes the commotion ensued, with groups battling about the floor and with no attempt by Milkovich to speak to the crowd or to restore order.

During the fighting Milkovich stood in its midst, in full position to see what was transpiring, often raising and waving his arms during the excitement.

Exhibits B, C, D, E, F, and G are excerpts from a videotape taken during the commotion and show Molkovich[sic], (towards whom has been inserted an arrow) standing in the midst of the fray.

Exhibit B shows Milkovich waving his arms, which I saw him do in disgust as the referee awarded the match to the injured boy. Thereupon, the fighting ensued as shown in the other pictures.

After the police has restored order, Milkovich addressed the crowd on the public address system, but the riot had then subsided.

The fighting was clearly visible to Milkovich, which I affirmed despite his court testimony to the contrary.

In my judgment his gestures and public behavior incited the trouble and his testimony to the contrary and his denials that he had so gestured were false. He did not attempt to quiet the crowd, despite his testimony to the contrary.

In my article of January 8, 1975, I reported that he had lied in his court testimony and this I believed to be true.

3) When I wrote the article of January 8, 1975, I then knew the following facts:

i) That the principal of Maple Heights High School had called the principal of Mentor after the above match to say that he had told Milkovich that his gestures had led the crowd to assume that the Mentor boy was faking injury, and that the Mentor athletic director had demanded that Milkovich act to quiet the crowd. The Mentor principal had told me this prior to the publication. See Affidavit of Peggy O. Hanrahan.

ii) That the Ohio High School Athletic Assocation had censured Milkovich for his conduct at the said wrestling match by a resolution after a hearing.

iii) That the Ohio High School Athletic Association Commissioner, through Harold A. Meyer, had written a letter of censure to Milkovich, which censure had been publicized in the Maple Heights newspaper long before I wrote the article of January 8, 1975. This letter of censure had been read to me by Dr. Meyer.

iv) That many spectators at the match had told me that they had seen the behavior of Milkovich at the match that night and that he had controlled and incited the crowd, all of which was known to me prior to the publication which is the subject of this lawsuit.

STATE OF OHIO)
LAKE COUNTY)SS:

Sworn to before me and subscribed in my presence, this 29th day of September, 1976 at Willoughby, Ohio.

Theodore Diadiun /s/
Theodore Diadiun, aka Ted Diadiun

Grace Salter /s/
Notary Public
Grace Salter
Notary Public for Lake County, Ohio
My Commission Expires May 20, 1977

EXHIBIT N

AFFIDAVIT

James Collins being first duly sworn says:

1. I am the Editor of the News-Herald, a daily newspaper published in Willoughby, Ohio, and was such on January 8, 1975.

2. On January 8, 1975, I believed the article published in said newspaper on said day about Mike Milkovich, Sr. and his testimony in a Columbus court, to be newsworthy, in the public interest and true.

3. I now believe said article, as it related to Mike Milkovich, Sr., plaintiff, to be true.

4. Said article was written in the general course of newspaper publication by a reporter for the News-Herald, Ted Diadiun; who witnessed the wrestling match referred to in said article.

5. Prior to said publication I had charged said Ted Diadiun, and all other employees and news writers of the News-Herald to write and publish only such items for publication in said newspaper as they believed to be true.

6. At the time of publication I had no reason to doubt the truth of the publication.

James Collins /s/
James Collins

STATE OF OHIO)
LAKE COUNTY)SS:

Sworn to before me and subscribed in my presence, at Willoughby, Ohio, this 8th day of October, 1976.

Grace Salter /s/
Notary Public

Grace Salter
Notary Public for Lake County, Ohio
My Commission Expires May 20, 1977

EXHIBIT O

AFFIDAVIT

Harry Horvitz being first duly sworn says:

1. I am President of The Lorain Journal Company and publisher of The News-Herald, a daily newspaper published in Willoughby, Ohio, and was such on January 8, 1975.

2. Ted Diadiun is a sports writer for The News-Herald and an employee of The Lorain Journal Company.

3. Prior to January 8, 1975, I had charged Ted Diadiun and all other employees, editors and news writers of the News-Herald to write and publish only such items for publication in said newspaper as they believed to be true. I had no knowledge of the article which is the subject of plaintiffs [sic] Complaint prior to its publication and I had no personal acquaintence with or knowledge of Mike Milkovich, Sr. prior to the publication of January 8, 1975.

4. Prior to said publication, I never discussed said publication or Mike Milkovich, Sr. with any person connected with the News-Herald, either personally or by telephone communication, writings or otherwise.

5. The article in question as published in the News-Herald was a newsworthy item of general interest about a public figure that was privileged for publication under the First Amendment to the Constitution of the United States and I believe the same to be true.

Harry Horvitz /s/

Harry Horvitz

STATE OF OHIO)
LAKE COUNTY) SS:

Sworn to before me and subscribed in my presence, at Cleveland, Ohio, this 15 day of October, 1976.

Rose H. Lomaz /s/

Notary Public

Rose H. Lomaz
Notary Public for Cuyahoga County
My Commission Expires August 22, 1981

EXHIBIT P

AFFIDAVIT OF WILLIAM G. WICKENS

1. I am attorney for the defendarts in this action and make this affidavit in support of defendants' Motion for Summary Judgment.

2. Exhibit A, attached to said Motion, is a true transcript of portions of the sworn testimony of the plaintiff, Michael Milkovich, as given at the trial of the case, Patrick J. Barrett et al. v. Ohio High School Athletic Association, Court of Common Pleas of Franklin County, Ohio, Case No. 74 CV-09-3390, given November 8, 1974, before Judge Paul W. martin, as prepared and furnished by the offical Court Reporters, Hall of Justice, Columbus, Ohio.

3. Pursuant to the order of this Court, I viewed and obtained from this plaintiff a copy of a video tape of portions of a wrestling meet between Maple Heights High School and Mentor High School on February 9, 1974. I was present at the projection onto a white screen of said tape-copy when photographs were taken of the action portrayed by said video tape-copy.

Exhibits B, C, D, E, F and G are photographs of scenes so portrayed, and accurately and faithfully portray scenes from said video tape, except that said photographs accentuate the dots to a greater degree than is apparent when the video tape is rolled in the portrayal of the motion.

4. Exhibit H is a true copy of the letter of censure address to the plaintiff Milkovich by the Ohio High School Athletic Association on March 5, 1974.

5. Exhibit L is a true copy of the Resolution of Censure adopted by the Ohio High School Athletic Association on February 28, 1974.

William G. Wickens /s/

William G. Wickens

STATE OF OHIO)
LORAIN COUNTY)SS:

Sworn to before me and subscribed in my presence, at Lorain, Ohio, this 15 day of October, 1976.

Richard D Panza /s/

Notary Public

Richard D. Panza
Notary Public State of Ohio
My commission has no expiration
date — Section 147.83 R.C.

Partial Transcript of Cross-Examination of J. Theodore Diadiun
(April, 1978)
[Included in Joint Appendix at Request of Defendants]

* * * * *

A. I'm the sports editor of the Willoughby News-Herald.

Q. And when did you first become employed by the News-Herald?

A. September of 1973.

Q. In what capacity were you then employed?

A. Sports writer.

Q. And did you have occasion in the year of 1973, from September through December of that year, to witness any wrestling matches? Did you cover any matches?

A. In '73?

Q. In '73.

A. I'm sure I did.

Q. Did you at any time witness or see any Maple Heights matches at that time?

A. I'm sure I must have.

Q. Now, Mr. Diadiun, in 1974, in February, I believe February the 8th, did you publish an article in the Willoughby News Herald, which was on a Friday, the Friday preceding the actual Maple-Mentor match. Did you publish an article characterizing that match, "the grudge fight"?

A. I don't believe I said "fight." That was in part of what I wrote in the story.

Q. How did you characterize it, as a grudge match?

A. I talked about what had happened the year before, how Mentor defeated Maple Heights for Maple's first conference loss in ten years. And I said, that naturally, Maple Heights wants to get even. And I called Coach Schonauer from Mentor, I called Coach Milkovich from Maple Heights.

Q. Did you characterize that match in your article as a grudge match?

A. In part, yes.

Q. You did characterize it as a grudge match?

THE COURT: He said yes. Could we go on to the next question?

Q. Now, on the following day, Mr. Diadiun, were you present at the Mentor-Maple wrestling match?

A. Yes, I was.

Q. Would you describe —

MR SIMON: Your Honor, may we have Mr. Diadiun draw a diagram on the board there?

THE COURT: Sure.

Q. Mr. Diadiun, would you address yourself to the blackboard there and draw a sketch as best as you remember it of the mat area?

A. What did you want me to draw?

Q. Draw as best as you can remember, the mat area itself, the Mentor stands, the Maple stands, and the geographical or physical area.

A. I can't call these Mentor stands and Maple stands, because there were fans from both sides.

Q. Mr. Diadiun, which stands were assigned to the Maple Heights spectators?

Would you draw on there where the wrestling teams were seated?

A. Yes.

As I stated, there were a group of Maple Heights fans up here. I don't know it it's fair to categorize.

Q. That's fine. Thank you.

Would you point out on the blackboard exactly where you were positioned?

A. I have it on there. I have it drawn on there.

Q. Were you standing or seated?

A. Seated.

Q. All right. You may take your seat, please.

Now, Mr. Diadiun, during the earlier part of the match, did you witness anything unusual that occurred prior to the 155-poûnd match?

A. During the 145-pound match, the Mentor boy pinned the Maple boy after being a pretty — handling him pretty well thoughout the match. That was the first match Mentor won after losing about the first six.

Q. Was the Maple wrestler a Caucasian?

A. No, a black boy.

Q. Isn't it a fact, Mr. Diadiun, some of the Mentor stands — did you hear any racial slurs directed toward that boy?

A. No.

Q. Now, when the 155-pound match took place —

A. I haven't finished telling you about the 145-pound match.

Q. Let me ask the questions, Mr. Diadiun.

THE COURT: Let him finish the answer.

A. After the pin, the Maple Heights boy stood up and wouldn't shake hands with the Mentor boy. And the official called him back and made him shake hands, and he finally just kind of waved at the boy's hand and went off the mat. It was a display that charged some of the fans.

Q. Mr. Diadiun, you are guessing that it charged some of the fans?

MR. HERZER: Objection.

THE COURT: The last of the remarks may go out. The jury is instructed to disregard.

A. I heard a lot of shouting from both sides after that.

Q. From both sides?

A. Um-hum.

Q. Now, do you know who was seated at the scorers' table?

A. No.

Q. Do you know whether or not there were any Mentor officials seated at that table?

A. There usually is a Mentor scorekeeper or the scorekeeper from the opposing team at the home score table. There must have been a guy from Mentor there.

Q. You described your position as being to the rear of the scorers' table and to the side; is that correct?

A. Approximately.

Q. Were there any spectators in front of you as you sat there?

A. I believe I was in the second row. There would have been possibly one or two, maybe two people seated in front.

Q. Now, during the 155-pound match, at what point of the match, if you remember, did the foul actually occur? Was it toward the end?

A. I think the score was 8 to 2 in favor of Girardi, so I imagine it was maybe the end of the second period.

Q. Isn't it a fact that the Maple boy brought his forearm down on the back of the Mentor boy's neck? Is that what the foul was?

A. Yes.

Q. And isn't it a fact the Frank Fiore, the referee, penalized the Maple boy?

A. Yes.

Q. Isn't it a fact that the Mentor boy was brought to the side of the mat and told to lay down?

A. I didn't hear what was said.

Q. Did you hear anything that was said at the edge of the mat there when the Mentor boy was laying down?

A. No.

Q. Now, would you indicate on the blackboard where the foul occurred?

A. It was right — I think it was the start of the action, so it must have been the circle in the middle of the mat. It must have been somewhere right around in there.

Q. Mr. Diadiun, please remain at the board, if you will.

After the foul, where was the Mentor boy? Where did the Mentor boy go?

A. I think he stayed right there for a while. And when it was clear that he was injured, he was helped over to the side of the mat.

Q. Where was he helped on the side? What point on the mat? Would you indicate with a chalk mark, please?

A. Probably here. He may have been off the mat a little bit.

Q. Do you know from your — do you know whether or not that boy walked from the center of the mat when the foul occurred?

A. I think he must have been helped up. I'm sure that the coach was out there checking his physical capabilities, and I think he helped him to the side of the mat.

Q. When he got to the side of the mat, isn't it a fact that he was told to lay down, that he did in fact lay down?

A. He did lay down.

Q. Physically?

A. Yeah.

Q. Did you hear anything at all about Coach Schonauer telling his boy to lay down?

A. No

MR. HERZER: Objection. He already answered that question as being no, he didn't hear anything.

THE COURT: The answer "No" may remain.

Q. Mr. Diadiun, what did you actually see after the Mentor boy, Pochatila, was laying on the mat at that point? What did you actually see?

A. As soon as it became evident that he was injured, it was — Mr. Milkovich came over and —

Q. Would you indicate on the mat where Milkovich was standing prior to that point?

A. I have it indicated.

Q. Would you point it out for the jury, please? And that is the Maple bench?

A. Yes.

Q. So that Coach Milkovich was standing at his bench?

A. Yes.

Q. From your experience in covering wrestling matches, is this the place he's supposed to be?

A. Yes, at the point of the foul.

Q. What did you actually see Milkovich do at that point when the boy was laying down?

A. As soon as he was helped to the side of the mat, Milkovich walked over like that and said something to Jim Schonauer, the Mentor coach.

Q. When he walked over to the boy, did you see him do anything unusual? Did he wave his arms or do anything unusual as he walked over?

A. Not when he first walked over, no.

Q. Did you see him have a — did you see him in what apparently was a conversation with Jim Schonauer?

A. Yes.

Q. And you testified you know nothing about that conversation?

A. No, I didn't say that. I said, *I* didn't hear what he said.

Q. But at that time, you didn't hear anything at all which occurred?

A. No.

Q. All right. You may be seated, please.

Isn't it a fact that Coach Schonauer — if you know, isn't it a fact that Coach Schonauer, told Milkovich, that he told Milkovich his boy couldn't wrestle, that he was injured?

MR. HERZER: Objection.

THE COURT: Sustained.

Q. Did you see or notice anything at all on Milkovich's expression at the time he was standing and talking with Schonauer?

A. As far as a normal expression, I guess. I don't ever remember making a point out of his expression.

Q. Was his back to the Maple stands, or was he facing the Maple stands?

A. His back was to the Maple stands.

Q. So he was facing the Mentor stands in full view when you saw him?

A. Yes.

Q. What occurred after the boy was declared ineligible to wrestle?

A. A lot that occurred before.

Q. What did you see immediately thereafter?

A. After he was declared ineligible?

Q. After he was awarded the six points.

A. I believe he threw — the Maple boy threw his headgear on the mat and went storming off. And when it became clear that the Pochatila boy was not going to be able to continue to wrestle, Mr. Milkovich sat over in his chair, and he kept going like this toward the mat, like as if to say, "The kid's faking it."

Q. You say Milkovich did this while he was seated?

A. Yes.

Q. In front of his team?

A. Yes. And up in the stands —

Q. Had Milkovich returned from his conversation with Schonauer?

A. Yes. I think he went over there twice, first to find out what happened, and he went back and sat down. And he kept going like this. And I noticed up in the stands, every time he went like that, several people did the same things. And there was a lot of shouting and screaming and hollering at the Mentor kid. I think the point should be made that there was a lot of Maple Heights fans in the opposite — where it was drawn on there, the Mentor stands, there were a lot of Maple Heights fans up there who had been, Schonauer told me later, heckling at him and the Mentor team.

Q. Did you see who started the fight on the Mentor-Maple benches?

A. The first thing I saw, I was watching Milkovich and Bob Girardi after the decision had been made. And I saw two Maple Heights kids go flying toward the, you know, racing over toward the

Mentor bench, in between that little area there, probably about ten feet in between the ends of the two benches. The two Maple Heights kids went running over to the Mentor bench. And I saw at least one of them throw a punch.

Q. Do you know the name of that boy?

A. I didn't at the time. I understand now that it was Dave Kastellic.

Q. Do you know whether or not that boy was suspended from wrestling?

A. I understood from the Ohio High School Athletic Assocation that they suspended him from the remainder of the year.

Q. Now, while this fighting took place with the two boys, isn't it a fact that Mr. Milkovich was still seated at his seat?

A. There weren't just two boys. As soon as that started, the whole melee began.

Q. When the two boys began the initial fight, and the Mentor boys, isn't it a fact that Coach Milkovich was seated at his bench with his team?

A. When the fight started, I didn't know what he was doing at that moment, because I looked at the fight. I think he was still standing after Girardi came off the mat.

Q. Wasn't it a fact he was s nding right there and restraining the crowd from coming down from the stands?

A. I don't believe that's true.

Q. You state that is not true?

A. No.

Q. Did you see Milkovich in any way participate in that fight?

A. No.

Q. Did you see Milkovich do anything but restrain some of the participants and the spectators from coming down?

A. I didn't see him restraining anyone.

Q. Did you see him standing in front of his bench while this altercation took place?

A. The last thing I remember is him standing in front of his bench, an then I watched the fight. And when I saw the people coming down out of the stands, I got up from my seat and ran down along the runway there. And there was a Maple Heights — there was a boy with a Maple Heights jacket on, coming out of the stands. Right at that moment, I put out my arm and kept him from going and joining the fight.

Q. What did you actually see Milkovich do during this fight that ensued at the bench?

A. During the fight, I saw him standing there. It looked like he had his hands in his pockets.

Q. That's all you saw at that point?

A. While the fighting was going on.

Q. When the fighting started on the benches between the Mentor and Maple wrestlers, isn't it a fact that Milkovich was standing at his place in front of the team and that he had his hands in his pockets and was doing nothing?

MR. HERZER: Objection, your Honor. There's about four or five questions in there, where he was standing, what he was doing.

THE COURT: Well, if the witness understands the question, he may answer.

Q. You understand the question, don't you, Mr. Diadiun?

A. Well yes.

Okay. He was standing over there by his bench. I already told you that.

Q. While he was standing in front of his bench, was he doing anything to incite a riot at that point?

A. The riot had already started.

Q. Now, which spectators came out of the stands first, if you know?

A. I think —

Q. Maple or Mentor?

A. I think they came out of the stand above the Mentor sign, where the "Mentor" is. I think so. That's where they came down and surrounded the Mentor wrestlers. I think everybody started to come out of the stands about the same time, once they saw the fight. But naturally, the people from the stands on the Mentor side there reached the fight first, because the fight took place on and around the Mentor bench and behind it.

Q. Now, in your article, Mr. Diadiun, you described Milkovich as egging the crowd on.

A. Yes.

Q. In what respect was Milkovich egging the crowd on?

A. Well, like I said, the whole time Pochatila was injured, and after it became clear he might not be able to return to the match, Milkovich sat there, and he kept waving his arms, and he went back over to the bench area. His son —

Q. Which area?

A. The Mentor bench area. His son, Mike, Jr., went over there too and was much more demonstrative.

Q. What about Mike, Sr.?

A. He went over there and was clearly shouting at Schonauer then and turned away in disgust.

Q. Didn't you indicate that you didn't hear anything that took place at tht point?

A. You could tell a shout.

Q. Did you hear what was said?

A. No.

Q. And now, did you notice any facial expressions?

A. Then he turned away in disgust.

Q. And which way did he turn?

A. He turned toward me and around back toward the Maple bench, I think.

Q. So when he had the disgusted look, he was looking at the Mentor stands. He had to be if you were looking at him.

A. Yes.

Q. Now, Mr. Diadiun, isn't it a fact you wrote in your article, Mr. Milkovich orchestrated and caused this riot?

A. Yes.

Q. And in what particulars, besides the hand gestures that you described, did he orchestrate some 2,000 people into a riot?

A. I don't believe I said there were 2,000 people in the riot. I think I said in my story, there were 100 or 150.

Q. Wasn't it a fact there were some 2,000 plus spectators in the stands?

A. Yes.

Q. And isn't it a fact, you testified, in your article that he orchestrated a riot?

A. Yes.

Q. And beside the gestures you just mentioned, how did he orchestrate a riot?

A. By displaying to the crowd he didn't feel that the Mentor boy was injured. By his gestures.

Q. But Mr. Diadiun, you don't know what he was thinking.

A. Can I finish my answer?

Q. But you don't know what he was thinking.

MR. HERZER: Your Honor, could our witness finish answering the question?

THE COURT: Continue.

A. He was clearly showing the disgust that the — the whole point of the issue there was whether or not the Mentor kid was injured. It was clear that a foul was committed. The only thing remaining was if the kid was able to come back to the mat and continue the match, and that the Maple boy would probably win the match. If he wasn't able to come back, then the match would be awarded to the Mentor boy, and that would be the end of an undefeated season for the Maple boy. The point was —

Q. Mr. Diadiun, would you be responsive to this question? Isn't it a fact you are speculating, and isn't it a fact it's your opinion he was disgusted, your opinion?

A. It was clearly demonstrated.

Q. But it's your opinion.

MR. WICKENS: Object to that, your Honor. He is asked, here, how he felt he exhibited disgust. He's answering the questions.

MR. SIMON: He's answered that question. I am going on to the next question.

Q. Is it your opinion?

A. Yes.

THE COURT: The answer may remain. Would you decide who is going to do the objecting?

Q. Now, Mr. Diadiun, did you write an article the next day about — or, the following day, on a Monday, in the News-Herald about what occurred at this Match?

A. I wrote an article on the following day, which was a Sunday. And then, I believe I wrote an opinion piece. I said what I felt happened in the Sunday piece.

Q. Did you write an article? Yes or no?

A. You said, either the following day or —

Q. What day did you write an article?

A. Both days.

Q. All right. Taking the first day, which was a Sunday, did you write an article concerning that match?

A. Yes.

Q. And what was the headline caption of that article, as you remember?

A. I believe it said, "Mentor Mugged at Maple."

Q. And isn't it a fact in that article, you published or you wrote your opinion as to who was at fault in the match?

A. In that first article?

Q. Yes, the next day, Sunday.

A. I don't believe I wrote that in that article.

Q. But you did say in that article that Mentor was mugged, didn't you?

A. The headline said that.

Q. You are not responsible for that headline?

A. I didn't write the headline.

Q. Who wrote the headline?

A. Jim McLellan, the sports editor at that time. I believe the word "mugging" was in the story.

Q. And this was based upon your interpretation of what happened at the match?

A. It was based on what happened at the match.

Q. But it's your opinion?

A. What I saw happen at the match, that's what it was based upon.

Q. Mr. Diadiun, isn't it a fact, you wrote a series of articles thereafter, all pinning the blame on Maple and the Maple Heights — the Maple wrestlers, and particularly Coach Milkovich?

A. I believe not all of them were that way. Two days later, we ran a story that said both sides, now, and print the Maple Heights side of what happened.

Q. Isn't it a fact, Mr. Diadiun, you published the address of the Ohio High School Athletic Association in your newspaper, in an article, and invited readers to submit letters to the Athletic Association expressing their dissatisfaction of the match?

A. I didn't do that. That was in response. Our sports editor wrote that addressing.

Q. Who is your sports editor?

A. Jim McLellan.

Q. He wrote that?

A. It was written in response to a number of phone calls we had from people who called to find out how they could register their objections to the way things had gone at the match. So as a public service to people calling, we print the address and said, "If anybody had anything to say —"

Q. Isn't it a fact, you urged these readers to write poison-pen letters?

MR. HERZER: Objection.

THE COURT: Sustained.

Q. Isn't it a fact, you urged these readers to write letters to the Association, giving their version of what happened?

MR. HERZER: Objection to the "urging."

THE COURT: Sustained.

Q. Isn't it a fact, you published the article, giving the Athletic Association address to the readers?

A. Yes.

A. And the import of that article was to send letters to the Association about the match?

MR. HERZER: Objection.

THE COURT: He may answer.

A. I believe the article said —

Q. Isn't it a fact that happened? I don't want an explanation.

MR. HERZER: Your Honor, he should have the ability and opportunity to explain his answer.

MR. SIMON: This is cross examination, your Honor.

THE COURT: Continue. What is your question?

Q. Isn't it a fact, this article published the address of the Athletic Association?

A. Yes.

Q. And isn't it a fact, that the import of this article was to have readers write letters to the Association?

MR. HERZER: Objection.

THE COURT: He may answer if he knows.

A. The import was just what I told you. It was in response to a number of phone calls we had from people, saying they would like to know where to register their protest. So as a public service to the readers, Jim printed the address of the Ohio High School Athletic Association as to where the people should channel their objections or their opinions on the match, should they so desire.

Q. Isn't it a fact that a large number of these letters went to the Athletic Association?

MR. HERZER: Objection.

THE COURT: If he knows.

A. I don't know.

Q. You don't know?

A. I don't know how many.

Q. Isn't it a fact that you were at the Athletic Association's first hearing?

A. Yes.

Q. And don't you know from your presence there, if there were letters present?

A. Yes. You said large numbers.

Q. Are you quibbling about the number?

MR. WICKENS: Object.

THE COURT: Sustained.

Q. There were letters that reached them?

A. Yes.

Q. And you do know, there were letters from the anti-Maple fans, if you will?

MR. HERZER: Objection.

THE COURT: Sustained.

Q. You were present at the hearing, and you heard and know about those letters, don't you?

A. Yes.

Q. So then, you do know where they came from and who wrote them.

MR. HERZER: Objection.

THE COURT: These letters are immaterial to the issues in this case.

MR. SIMON: Your Honor, they are not immaterial.

THE COURT: If I give somebody an address, I'm responsible for anybody who used the address?

MR. SIMON: I'm not implying that, your Honor.

THE COURT: That's what you are endeavoring to imply.

Objection sustained.

Q. Do you know if Ben Klepek wrote a letter?

A. Yes.

Q. And isn't he from the Mentor area? Do you know who Ben Klepek is?

A. I didn't at the time. I do now.

Q. Who is he?

A. He is the principal of Eastlake Junior High.

Q. And wasn't there a gentleman named Harry King, who wrote a letter too?

A. Yes.

Q. And who is he?

A. I believe he works in Euclid, is the Euclid wrestling coach, in the Euclid School System. I didn't know him then.

Q. Weren't there letters from other Lake County officials, schools, so forth?

A. Yes.

Q. Mr. Diadiun, were you present at the first Ohio High School Athletic Association meeting?

A. Yes.

Q. Do you recall when that was?

A. I don't know the exact date. It was about three weeks after the fight at the wrestling match.

Q. Did you testify at that hearing? Yes or no?

A. Yes.

Q. Did you testify against Maple?

MR. HERZER: Objection.

THE COURT: Sustained.

Q. Did you tell your version of what occurred at the match?

A. I told what I saw, yes. I volunteered, because I didn't — I went down to —

Q. You've answered the question. You testified at the hearing.

Mr. Diadiun, isn't it a fact, you went down to the hearing to make sure of your presence, and that you could tell the Athletic Association your version of the story? Didn't you specifically go there for that purpose?

A. No.

Q. Who did you tell your story to, Dr. Meyer or the Board of Control?

A. I went as a reporter, and there were several things that were taking place. A couple of things, they were using my story, one of my stories. The Board of Control had one of my stories in their possession, and they talked about a couple of things I quoted Mr. Milkovich

on saying after the meet had taken place, and he was — he denied saying them. So I just — the only thing I said that I had been a reporter for six years and never had anybody say that, deny a quote or say he was misquoted in any of my articles. And I said I stood by that quote.

Q. Was your testimony at the first Athletic Association meeting in conflict with the testimony of the Maple Heights representatives?

A. Yes.

Q. So is it fair to say, you presented a different picture of what occurred than they did?

A. Yes.

THE COURT: Excuse me, Mr. Simon. I think it's time for our afternoon recess.

The jury is again reminded of the admonition of the Court, not to discuss the case or to form or express an opinion.

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THEREUPON, a brief recess was taken, after which the following proceedings were had in the presence of the jury:

THE COURT: Please be seated. Continue Mr. Simon.

CONTINUED CROSS EXAMINATION OF THEODORE DIADIUN BY MR. SIMON:

Q. I believe, Mr. Diadiun, that we left off before the recess, where you testified you were at the first Athletic Association meeting and told your version of the story; is that correct?

A. Yes.

Q. Now, Mr. Diadiun, isn't it a fact, you never attended any Ohio High School Athletic Association meetings prior to this?

A. Yes, it is.

Q. It's a fact you never did?

A. No. I never had a reason to.

Q. But on this occasion you did?

A. Yes.

Q. Did you attend any further or subsequent meetings of the Ohio Athletic Association which dealt with the Milkovich-Maple Heights matter?

A. No.

Q. You did not?

A. No.

Q. That was the only time you were there?

A. Yes.

Q. Mr. Diadiun, isn't it a fact, you were out to get Milkovich?

MR. HERZER: Objection.

THE COURT: He may answer.

A. Absolutely not.

Q. Have you ever told anybody you were out to get him?

A. No.

Q. Mr. Diadiun, you are familiar with the date. Do you know about the time that the Common Pleas Court trial occurred?

A. I believe it was November 8, 1974.

Q. Prior to that trial, had you any knowledge of the fact that that lawsuit had been filed with the Common Pleas Court?

A. Yes.

Q. When did you first learn that?

A. I talked with Dr. Meyer several times, between the time of the hearing that I attended and the lawsuit. And I may have read in the Cleveland papers about when it was coming up, the Plain Dealer and the Press about the lawsuit. But I talked to Dr. Meyer following both hearings, that whether Maple Heights was appealing the original ruling by the OHSAA.

Q. How did you learn of it? Was it through Dr. Meyer that you learned, or don't you know?

A. Dr. Meyer, I talked to him after, I believe, Maple Heights and Mike Milkovich and the administrative people went down and talked to the OHSAA two more times. And after the second time, Dr. Meyer told me he felt there would be a lawsuit. And then, I must have read about it in one of the Cleveland papers after that.

Q. So that you first really learned of it through reading another newspaper; is that correct?

A. Perhaps. I told you I can't remember. I might have heard it from Dr. Meyer first.

Q. Now, Mr. Diadiun, could you pinpoint approximately — and I know that you can't remember exactly — when you first learned of it, about when in point of time? You remember the trial was November of '74. Would you say it was the summer of '74 that you learned of it?

A. Probably the end of the summer.

Q. And isn't it a fact, Mr. Diadiun, you never read the complaint filed by the Plaintiff, Milkovich, by Ray Barrett, in the Franklin County Common Pleas Court? Isn't it a fact when you first learned of it, you never read the pleadings, the complaint of Ray Barrett?

A. Yes.

Q. So it's fair to say, you didn't know at the time when you first learned about it, what this trial was all about, the forthcoming trial?

A. I knew from talking to Dr. Meyer what some of the issues were going to be.

Q. And did you know then that the issues were due process?

A. I can't say that I knew then, no.

Q. Did you ever see the response of pleadings by the Ohio High School Athletic Association, from their law office?

A. No.

Q. You never saw those.

Did you at any time after the filing of the lawsuit, make it your business to find out what the lawsuit was all about?

A. I talked to Dr. Meyer about it. He told me.

Q. Was that the only source of your information?

A. That, and reading about it in the Plain Dealer and the Press. They both wrote stories about the lawsuit. And I believe I saw something in the Maple Heights Press too about it.

Q. Now, when did you first become aware of the fact that this was a due process hearing and not a fault-finding hearing, if ever you became aware of it?

A. I thought that the fault-finding would be included in the trial, yes. I knew that due process was one of the issues. I also thought that one of the issues were whether or not — who was at fault.

Q. In other words, whether Milkovich incited a riot or whether Maple was at fault; is that correct?

A. Yes.

Q. And you did know that Milkovich wasn't the plaintiff in that action, a party to the lawsuit?

A. Yes.

Q. And prior to the actual suit itself, isn't it fair to say, you didn't even know Milkovich would testify?

A. I can't say that. Dr. Meyer told me he would be — he was sure he would be testifying. I knew he was going to be there.

Q. It was your opinion? You have no factual basis?

A. From speaking with Dr. Meyer about it.

Q. Isn't it a fact that only the lawyer, if you know, knows who is going to testify for him?

MR. HERZER: Objection.

THE COURT: Sustained.

Q. So that prior to the actual trial, you knew there was a due process issue, and you assumed that Milkovich would testify, and you assumed that it would be on the question of fault; isn't that correct? Is that a fair statement?

A. Yes.

Q. You hadn't read any of the pleadings, so you don't know with any certainty.

MR. HERZER: Objection.

THE COURT: Sustained. That has been asked and answered.

Q. Were you aware, Mr. Diadiun, of the date set for hearing on that trial?

A. Yes.

Q. And how did you first become aware of that?

A. Probably from reading about it in the Plain Dealer and the Press.

Q. Didn't you feel it newsworthy to verify the forthcoming of that trial, since you took time out to attend the Athletic Association hearing?

A. To find out what?

Q. To find out what this trial was about and what was going to take place.

A. I knew what it was about and what was going to take place from speaking to Dr. Meyer.

Q. Why didn't you attend that meeting?

A. Because I wasn't called and didn't feel I would have any opportunity to testify. And I really didn't think by that time, as far as a local issue for my local paper, it wasn't that much of — it wasn't news for my people.

Q. You mean to tell this jury that after being present at that match and telling the Ohio Athletic Association, going down there

and telling them that Milkovich was guilty of inciting a riot, you didn't think it was newsworthy to go to that hearing?

MR. HERZER: Objection.

Q. Is that what you are telling this jury?

MR. HERZER: Objection.

THE COURT: Sustained.

Q. Mr. Diadiun, how did you at that time, before you wrote this article, know what took place in fact at that trial?

A. I talked to Dr. Meyer about it.

Q. And do you remember when you talked to Dr. Meyer? Was it after the trial?

A. Yes. The trial took place on November 8th. And the following week — I think that was a Thursday night. I didn't have a chance to talk to him that night. And I talked to him about it the following Monday or Tuesday. I called him at the OHSAA, and we talked about it then. And he was very upset and discouraged by the trial, because he told me that at the time. He said that, "I can tell you this: Some of the stories that they told to the Judge sounded pretty darned unfamiliar."

Q. Did he tell you that Scott lied?

A. He said "they," talking about Maple Heights.

Q. Did he include Scott?

MR. HERZER: Objection. Objection, your Honor.

THE COURT: Sustained. I don't know who he meant. Besides that, we're into hearsay.

Q. Did he tell you that Milkovich lied?

THE COURT: That would be hearsay, wouldn't it?

MR. SIMON: Has there been an objection lodged to that conversation?

MR. HERZER: Yes.

Q. Isn't it a fact, Mr. Diadiun, that you never read any transcript of what occurred at that trial until after you published the article?

A. Yes.

Q. Isn't it fair to say, then, other than your alleged telephone conversation with Dr. Meyer, that you knew nothing about what took place at that trial?

A. It was not alleged, and it wasn't one conversation. It was three different conversations I talked to him about it. He said — he made the comment —

Q. The Court has excluded what you are about to say.

So that you are telling this jury that this is the sole link that you had with that trial; is that correct? Dr. Meyer?

A. With the trial?

Q. With the trial and what took place at that trial.

A. Yes.

Q. That's the only link that you had; is that correct?

A. Yes.

Q. And you based your article upon what that telephone conversation — whatever that phone call happened to be; is that correct?

A. Not necessarily. I based my article on everthing I knew about the case.

MR. HERZER: Objection, your Honor. He can't even answer the question.

THE COURT: Sustained.

MR. SIMON: Let me rephrase the question.

MR. HERZER: Let's have the question read back.

THE COURT: Are you willing to withdraw your question?

MR. SIMON: I will withdraw the question, your Honor, and rephrase it, so that we have some continuity here.

Q. Isn't it a fact, Mr. Diadiun, as to what testimony took place at that trial, that you had no knowledge of what took place at that trial except for your conversation with Dr. Meyer; is that correct?

A. Yes, yes.

Q. And when you published this article, when did you first learn of the results of this hearing?

A. The day before the article was published.

Q. And how did you first learn of the results of that hearing?

A. I read a story on the Associated Press wire about the results, saying what had happened.

Q. Were you aware of the fact that Judge Paul Martin, of the Franklin County Common Pleas Court, issued a written decision on this case? Were you aware of that?

A. I don't know.

I didn't — had written a decision when the case was resolved? I assume that's what the Judge does, yes.

Q. Didn't you think it was necessary for you to read that decision before you published such an article?

A. Like I said, I knew the background of the whole case. I know what Dr. Meyer told me went on at that trial. I didn't feel that I needed —

Q. Outside of what Dr. Meyer said, didn't you feel you should read the Judge's opinion as to the decision of what took place at the trial, when you weren't even there?

MR. HERZER: Objection. The question has already been asked and answered.

THE COURT: Sustained. I think it's a little bit argumentative.

Q. The fact of the matter is, you never took the trouble to find that decision and read it, did you?

MR. HERZER: Objection.

THE COURT: He may answer.

A. I didn't find the decision, no.

Q. You didn't find it necessary to read it?

A. No.

Q. At the time you published this article, Mr. Diadiun, isn't it a fact, you were incensed and outraged at the decision of this Court?

MR. HERZER: Objection.

THE COURT: Sustained.

Q. What was your state of mind when you published this article?

A. I felt it was unfair.

Q. Unfair in what respect?

A. I felt that it was unfair that the decision should be overruled, because I felt with talking to Dr. Meyer and having followed the case all the way through and knowing what had gone on at the match, and knowing the way it was displayed in front of the Ohio State High School Athletic Association, and knowing what Dr. Meyer told me about the testimony in Franklin County Court, I felt that the facts had been misrepresented, and that the Maple Heights people who testified before Judge Martin had not told the truth about it.

Q. Isn't it a fact you didn't even know who testified?

A. Yes, I knew. Dr. Meyer told me.

Q. Did he tell you all the witnesses?

A. He told me Milkovich and Scott testified.

Q. Did he tell you who the other witnesses were?

A. He may have.

Q. You don't remember?

A. No.

Q. Were you, at the time you wrote this article, acquainted with the issues of due process which took place at the trial?

A. To a certain degree, yes.

Q. How would you know that? How did you know that, what the issues were?

A. I don't understand the question.

Q. How did you know what the legal issues were before that Court?

A. From what Dr. Meyer had told me about the trial.

Q. Dr. Meyer told you about the legal issues?

A. He said that the issues seemed to be — he said that the Judge — or, that the lawyers seemed more interested in the fact that Maple Heights hadn't been aware of the people that went down to the original hearing, hadn't been made aware of the exact letter of the law, rather than finding out who was right or wrong in the case.

Q. Did Dr. Meyer also tell you 95 percent of that case was dedicated to due process?

A. No.

Q. Did you know that to be a fact?

A. 95 percent of it was?

Q. Yes.

A. No, I didn't.

Q. Do you know that now?

A. No.

Q. In your article, "Diadiun says, Maple told a lie," were you referring to the fact of Milkovich's testimony and H. Don Scott, the Superintendent of Maple Heights? Were you saying their testimony as it related to due process was a lie?

MR. HERZER: Objection to the reference of H. Don Scott.

THE COURT: Sustained.

Q. Let's direct our question toward Mike Milkovich.

A. Toward due process?

Q. Yes.

A. No. The lie I was talking about was the one I had been aware of all along and the lies, the complete misrepresentation of what had actually happened to put Maple Heights in a good light in front of the Judge.

Q. Were you aware of the fact that that trial was not about whether Maple was at fault or Milkovich was at fault?

MR. HERZER: Objection.

THE COURT: Sustained.

Q. Is it fair to say, Mr. Diadiun, that the sum and substance of your testimony as to your only link to that trial and what occurred at that trial was Dr. Meyer?

MR. HERZER: Objection.

THE COURT: Sustained.

MR. SIMON: On what grounds, your Honor?

THE COURT: He isn't going to draw the conclusion. The jury has to draw the conclusion.

Q. All right. Then let's forget conclusions.

Isn't it a fact, the only link you had with that trial is Dr. Meyer?

MR. HERZER: Objection. He already stated that he had a wealth of background and information going through his head when he talked to Dr. Meyer about the trial. The only link is not Dr. Meyer.

THE COURT: Sustained.

Q. If there is another link, as counsel suggests, to what you found out occurred at the trial, tell us about it.

A. The article wasn't only about the trial. The article was about —

Q. What occurred, only referring to what occurred at that trial? You reported about a trial you weren't at, didn't read a transcript, and knew nothing except from talking to Dr. Meyer. Counsel suggested you know other things.

A. I commented on the decision of the trial because of all of the background I had leading up to the trial, because of things I saw with my own eyes and heard with my own ears, and conversations that I had — three conversations I had with Dr. Meyer, between the hearing and the trial, substantiated by what I already believed.

Q. Mr. Diadiun, the point I'm trying to make is, you didn't know what was testified to, except for talking to Dr. Meyer.

MR. HERZER: Objection, your Honor. He's making argument now to the jury.

THE COURT: Sustained.

Q. Who else told you what occurred at that trial?

A. No one else.

Q. Did you read anything else which told you what occurred at that trial?

A. I may have. There was an article in the Maple Heights Press. I don't remember the date.

Q. Published before your article?

A. I don't remember whether it was before or after.

Q. Didn't you testify you wrote the article immediately following the wire clipping on the decision?

A. Yes. But it was two months after the trial itself.

Q. Your article was written the next day after the decision came out, wasn't it?

A. Yes.

Q. Isn't it a fair assumption to say, you didn't read the account of that trial from another newspaper?

MR. HERZER: Objection. He stated he read the AP wire story. He already mentioned that.

MR. SIMON: The witness suggested he thought he read it in other newspapers.

MR. HERZER: I think the questions are confusing, confusing as to what you are talking about, the decision or the actual trial.

A. The trial took place on November 8th, and the decision wasn't announced until January 8th. There was a two — month interval.

Q. Isn't it a fact, the day after the decision was rendered, you published the article?

A. Yes, after the decision. I remember seeing a story about the trial from a Maple Heights reporter who was either there or had talked to people there about the testimony at the trial.

Q. Are you telling this jury, within a space of one day, another newspaper published that?

A. No, no. After the November 8th trial, there may have been a story in the Maple Heights paper about what had gone on at the trial. I'm not sure whether it was before — I think it could have been before the decision was announced, but I'm not sure.

Q. Are you telling this jury that perhaps the basis of your article, beside H. Don Scott, besides Dr. Meyer, was another newspaper article?

A. Absolutely not.

Q. Absolutely not?

A. No.

Q. Now, Mr. Diadiun, when you wrote the article, you testifed that Milkovich committed perjury; isn't that correct? You wrote in your article he committed perjury?

A. I didn't write that.

MR. HERZER: Objection.

THE COURT: Sustained. I don't remember seeing that word in the exhibit you had.

Q. Did you write an article which said Milkovich lied in open court, under oath, after he had given his solemn promise to tell the truth?

A. I didn't say it in those words.

Q. I'm going to quote you from your article, Mr. Diadiun. And I quote from the third — last paragraph of your article: "Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth."

Are you denying that you wrote that?

A. No. That's not what you said before, though.

Q. Mr. Diadiun, when you said they lied at that trial, what specifically did Mike Milkovich lie about? Tell us about that.

A. He lied about the way he presented himself and his version of what went on at the wrestling match, to the Court. The conversation I had with Dr. Meyer told me the story had changed. He told me that. He says, "I don't know what we're supposed to do in this judicial system. Just tell your side and the hell with the truth."

I knew of several specific lies I heard him tell, himself, at the meeting of the OHSAA.

Q. Mr. Diadiun, you said this man lied under oath at the trial. Will you tell this jury specifically —

MR. HERZER: Objection.

THE COURT: The basis of your objection?

MR. HERZER: The objection is to mischaracterizing the article. Read the last sentence.

MR. SIMON: Your Honor, do I have to repeat that?

THE COURT: Read the whole article, no.

MR. SIMON: That particular portion.

MR. HERZER: That last part of it.

MR. SIMON: Does the Court wish me to read that again?

Q. When you wrote this article and said Milkovich lied under oath, you admitted you wrote, tell this jury specifically about the numbers. Item Number One, what did he lie about specifically?

A. At the —

Q. At the Common Pleas Court trial in Franklin County, in November, 1974.

A. I knew that he had lied about —

Q. That's not the question. What specifically did he lie about? Tell this jury what he lied about.

A. About the way he presented his version of the match.

Q. In what particular respect?

A. The fact that he couldn't control the crowd, the fact that —

Q. You say Milkovich said in his transcript, he couldn't control the crowd? That's how he lied?

A. That's what I got from my conversation with Dr. Meyer.

Q. From a hearsay conversation?

MR. HERZER: Objection.

THE COURT: Sustained.

Q. All right. So Item Number One, you are saying Milkovich lied at the trial when he said he couldn't control the crowd; is that correct?

A. (The witness nodded affirmatively.)

Q. What is Item Two?

A. He didn't see any fighting.

Q. Have you read Mr. Milkovich's testimony at that trial?

A. Yes.

Q. How did you come to read it?

A. I read it since — I read it since the suit brought here.

Q. And who asked you to read it?

A. Who asked me to read it?

Q. Yes.

A. I wanted to. I asked to read it.

Q. You did?

A. Yes.

Q. Of your own accord?

A. Yes.

Q. Isn't it a fact, your lawyer asked you to read it?

MR. HERZER: Objection. What relevance?

THE COURT: Sustained.

Q. So beside the Milkovich testimony, he couldn't control the crowd, what else did Milkovich say that constitutes a lie?

A. From what I knew when I wrote the article, that's about it.

Q. What specifically did he say at the trial which was a lie?

A. Are you asking me what I know now or what I knew when I wrote the story?

Q. When you wrote the story, your state of mind was that you said he lied under oath. And I want you to tell this jury, in good conscience, what did he say at that trial that constituted a lie?

A. I just told you, from what Dr. Meyer told me, that the stories changed. I had known the specific lies I had heard him tell. Dr. Meyer told me that. He just said, "You're supposed to tell your side and the hell with the truth, I guess." And I took from that conversation that he had lied about the same things he lied about at the hearing.

Q. You were assuming all that? He lied about the same things at this trial that he lied about at the Association? Is that what you are saying?

A. From my conversation with Dr. Meyer, yes.

Q. So you really dont' know specifically what he lied about, do you?

MR. HERZER: Objection.

THE COURT: Sustained.

Q. Do you know what he specifically lied about?

A. Yes.

Q. What?

A. I just told you.

Q. You gave me an answer which talked about generalities.

MR. SIMON: I found no specifics, other than the first item, in which he said he testified he couldn't control the crowd.

MR. HERZER: He also testified that Milkovich said he had not seen any fighting. We've been through that.

MR. SIMON: All right.

Q. Was there anything else he lied about at the trial?

A. Nothing that I knew. Nothing that I knew then.

Q. So specifically, the only three items that you allege that he lied about at the time you wrote this article: One, Milkovich said he couldn't control the crowd; is that correct?

A. Yes.

Q. Two, he didn't see any fighting; is that correct?

A. Yes.

Q. And what was the third?

A. I believe those were the two things that we talked about.

Q. Just those two items?

A. That's not the only thing we talked about him lying.

Q. We're referring to the Common Pleas Court trial, which you were not present at. You only had an alleged conversation with Dr. Meyer, and you have stated that Milkovich specifically stated about two items; is that correct? Is that correct, he lied about two items?

A. Yes.

Q. Specifically?

A. Yes.

Q. And you are telling this jury, even though it's hearsay, that Dr. Meyer, among other things —

MR. HERZER: Objection.

THE COURT: Sustained. He's not only telling the jury, he's telling you and he's telling me. Please don't preface your questions with that remark anymore.

THE WITNESS: Should I answer that, or —

MR. HERZER: No.

THE COURT: I don't think there is a completed question in front of you, sir.

Q. Let us address ourselves, Mr. Diadiun, to Item Number One, that Milkovich lied when he said he couldn't control the crowd.

Mr. Daidiun, isn't it a fact that this is mere opinion and specualtion on your part?

A. No.

MR. HERZER: Objection.

THE COURT: Sustained.

Q. Isn't it a fact that you base this statement upon what you personally saw and believed to be true?

A. I based that on what I have seen of Mr. Milkovich from the time I began covering high school werestling in 1967, not just on that one match. I know how he's able to control the crowd, or he was able to when he was over there. I know he could control the crowd just by simple gestures. And when he said that he didn't have any control over the crowd, that they just did what they did of their own volition, that wasn't true.

Q. In your opinion?

A. In my opinion and in the opinion of —

Q. We're talking about you, though, in your opinion.

A. Yes.

Q. So you now testified, you know more about Milkovich than when you started with the News-Herald in September of '73. You just testified, this goes back now to '67, '68?

A. From my observation?

Q. Yes.

A. That's the first time I ever saw him at a wrestling match, yes.

Q. You know he could control crowds by watching him at other matches?

A. Yes.

Q. How does he control crowds?

A. For instance, where there would be a wrestling match and a boy was almost ready to complete a move, Mr. Milkovich would go like this with his hand, say that two points should be awarded. And all through the stands, as soon as he did that, you would see people mimicking his gestures. And from time to time I saw him at the match in question, I saw him making these gestures in disgust and saw a lot of other people.

Q. Let's go back to 1968, Mr. Diadiun. Were you employed then?

A. Yes.

Q. And what was your occupation then?

A. I was a sports writer for the Painesville Telegraph.

Q. And in that capacity, you covered other matches where Milkovich was coach; is that correct?

A. Yes.

Q. Did you cover almost all of the Milkovich matches from '68 until the time he retired?

A. No.

Q. And in your coverings of those matches in 1968, did you find that Milkovich was an offensive character?

A. Oh, no. I had nothing but the utmost respect for the things he accomplished in the world of wrestling.

Q. Did you think personally, he was abrasive and could control crowds and egg a crowd on?

A. Controlling a crowd and being abrasive? I've seen him control crowds, yes.

Q. From watching from 1968, you think he could control crowds by gesture of the hand with two fingers up?

A. Yes.

Q. How easily does he control the crowds?

A. The crowds would seem to mimick everything he did. If he would show disgust, the crowd would show disgust. If he would call — if he would go like that, and say his boys should get some points for a move that hadn't been awarded yet, the crowd would follow his lead. Things like that.

Q. So when you witnessed the Maple-Mentor match of 1974 in February, you didn't for the first time see Milkovich do what you said he did. You were basing your opinion on events that you had witnessed from 1968 forward; is that correct, for a previous six years? You formulated an opinion about Milkovich already?

MR. HERZER: Objection. He said he had not.

MR. SIMON: About his ability to incite a riot.

THE COURT: We're not interested in his opinion as to his ability. He's not an expert. He's not entitled to express an opinion on that.

MR. SIMON: Your Honor, may I respectfully point out, he answered.

THE COURT: That doesn't mean I can change the rules of law.

Q. Now, from '68 forward, did you work in a continuous time sequence from the Painesville Telegraph?

A. No, I was going to college. I went to Kent State, and I would work on the weekend. I would come back on Friday and Saturday night to Painesville and cover matches and football games, and things like that, for the Telegraph, to help put myself through school.

Q. And during this period of time, you consistently watched Maple matches; is that correct?

A. Not consistently. When they would be wrestling with one of the better teams from our area, I would go to the match. A couple of times, I went over to the Maple gym and covered matches there.

Q. Did you ever see Milkovich incite a riot before?

A. No.

Q. Never?

A. No.

Q. Would you characterize his behavior as being sportsmanlike at these previous matches that you had seen?

A. Yes.

Q. Did he conduct himself within the rules of the wrestling decorum, if you will?

MR. HERZER: Objection.

THE COURT: Sustained. Let's get back to the issues in this case, please.

Q. Mr. Diadiun, do you know what the circluation of the Willoughby News-Herald was in 1974, February or March?

A. I believe it was 27,000.

Q. And where, basically, is this Willoughby News-Herald circulated?

A. Mostly in Lake County and some of the northern fringes of Geauga County, and the eastern fringes of Cuyahoga County.

Q. Mr. Diadiun, you've testified that Mike Milkovich lied at the Ohio High School Athletic Association when you were first there; is that correct?

A. Yes.

Q. Is it your contention now that the same lies he told at the Athletic Association, he told at the trial?

A. Some of the same ones. It wasn't all. From what I understand, the testimony wasn't the same at the trial as it was at the hearing.

Q. But do you know in what particulars they were different?

A. What, the lies were different, you mean?

Q. Yes.

A. Just from talking with — I don't know what you mean I guess.

Q. You said he lied at the Athletic Association hearing, Coach Milkovich.

A. Yes.

Q. You also said he lied at the trial.

A. Yes.

Q. You also testified that you were told that the stories were different.

A. Yes.

Q. I want to know if you know in what particulars, some specificity, how they were different.

A. They weren't — Dr. Meyer didn't tell me with any great amount of specificity. He said the stories changed, the emphasis was different.

Q. Could he have been talking about due process?

A. He could have been.

Q. So actually then, the first hearing at the Athletic Association didn't deal with any question of due process. And certainly, if the trial dealt with due process, isn't it fair to say that that could be different?

A. Yes.

Q. Dr. Meyer admit that?

A. Pardon me?

Q. Could Dr. Meyer have admit that?

A. He could have. I didn't believe it at the time. I didn't think that's what he meant at the time.

* * * * *

Q. Could you have been mistaken now that you now know that this hearing was all about due process?

A. It's possible.

Q. Was this article in part, based upon your previous experience and knowledge of Milkovich, dating back to '68, all the way from '68 up till this article was written?

A. No.

Q. The presumption that he was lying?

A. No. It was based only on what I saw at that wrestling meet and what I heard at the meeting and what I heard from Dr. Meyer and from other people involved, what I read in other newspapers.

Q. I'm going to end this cross examination.

So is it fair to say with the two particular specifications that Milkovich lied at the trial, that you have numerated, were: He testified he couldn't control the crowd, one. He couldn't control the crowd; that's specifically about it?

A. Yes.

Q. And that you had a telephone conversation with Dr. Meyer, which we will not get into, in which you base your article upon; is that correct?

A. I already said, that wasn't necessarily what I based my article upon. That was just part of the article that referred to that trial.

Q. The particular portion of the article that accuses Milkovich of lying at the trial. I'm referring to that specifically.

A. Yes.

Q. Did you base that upon your previous experiences with Milkovich?

A. No. I base that portion on what Dr. Meyer told me.

Q. So when you get right down to it, it's Dr. Meyer that told you.

A. Yes.

Q. That's the only concrete link you had, was that Dr. Meyer told you Milkovich lied. That's about it, isn't it?

A. Yes.

Q. One last point, Mr. Diadiun. Two last points.

One, I believe you testified previously that you have never, ever said to anyone, you were out to get Milkovich; is that correct?

A. Right.

Q. You never old anyone, "I got Milkovich"?

A. No.

Q. Now, with reference to where you were seated and what you saw, are you positive you were sitting behind the scorers' table to the left of the table?

MR. HERZER: Objection, your Honor. He's going over old ground.

THE COURT: Sustained.

MR. SIMON: Your Honor, I just want to emphasis that one point.

THE COURT: I don't want any emphasis if it's already been testified to.

* * * * *

Partial Transcript of Direct Examination of Michael Milkovich, Sr.

(April, 1978)

[Included in Joint Appendix at Request of Defendants]

DIRECT EXAMINATION OF MICHAEL MILKOVICH

BY MR. SIMON:

Q. Would you state your name, please?

A. Mike Milkovich.

Q. Where do you reside?

A. 15600 Rockside Road, Maple Heights, Ohio.

Q. Mr. Milkovich, how long have you resided there?

A. Since 1950.

Q. And what is your occupation?

A. School teacher and coach.

Q. How long have you been employed as a school teacher and a coach?

A. Since 1948.

Q. When did you first become employed by the Maple Heights School system?

A. 1950.

Q. And when did you retire from the Maple Heights system?

A. 1977.

Q. Mr. Milkovich, what college did you attend?

A. Kent State University.

Q. And what was your major there?

A. Industrial Arts, Physical Education.

Q. Directing your attention to your first year at Maple Heights, would you tell this Court what the situation was regarding — as it relates to wrestling?

MR. HERZER: Objection.

THE COURT: The basis of your objection?

MR. HERZER: I think the question is too broad and open-minded. I don't know what he means by "what the situation is." Therefore, I don't think it's relevant.

THE COURT: Can you be more specific?

Q. With regard to wrestling, Mr. Milkovich, what was — did the Maple Heights High School have a team at that time?

A. Yes, they just started a team. I think the coach quit, and I was the first coach that they hired for the sport.

Q. Did they participate in dual meets at that time? They may have at one or two dual meets or several duel meets, and they entered some boys in the State Tournament.

Q. Mr. Milkovich, when would these wrestling matches take place?

A. At 3:30, after school.

Q. And how often during the week?

A. Perhaps once a week.

Q. Mr. Milkovich, did there come a time when the wrestling matches changed from the afternoon?

A. Yes. In 1952 or 3, I got some parents together, and we insisted on night matches, because we weren't making enough money. And we felt as though if we brought the matches at night, we could make more money to support the wrestling team.

Q. Did you in fact accomplish this?

A. Yes.

Q. Mr. Milkovich, at that time, if you recall, what was the seating capacity of that gymnasium at Maple?

A. Perhaps about 12, 13 hundred in our old gym.

Q. In your old gym. Mr. Milkovich, in the year 1951, directing your attention to that year, can you estimate in a general approximation how many spectators would attend these meets?

A. In 1951?

Q. Yes.

A. I don't think we made enough money to pay for the officials.

Q. About how many spectators were there?

A. Twenty-five or thirty.

Q. Mr. Milkovich, in 1974, how many spectators did you in fact have at — February 8th of 1974, the Maple-Mentor match? How many spectators were present then?

A. Perhaps 2,000 or more.

Q. Now, Mr. Milkovich, directing your attention back again to 1951, did you institute any different procedures with wrestling at that time?

A. Yes, I did. I organized the girls in school as a Booster Club. And the girls' jobs were to make signs, write articles about the wrestling team, decorate their lockers, bring in fruit in the morning, make signs in the building, signs for buses, and it was very effective.

Q. In what way was it effective?

A. Because it created more publicity in school, and the wrestlers felt as though they were a little bit more important because someone had done these extra things for them.

Q. What other innovations did you make at the time?

A. In addition to the Girls Booster Club, I organized some cheerleaders. We worked on cheers. We transferred cheers from football or basketball into wrestling cheers. As a matter of fact, I would put groups of girls together just working on cheers. And I think in 1975 or 1976, we had over two hundred — some cheers when I published or submitted it to the "Amateur Wrestling News," and they published it nationally.

Q. Mr. Milkovich, with respect to those cheerleaders, was it — from your experience as a coach, did the wrestling teams from other schools, if you know, have cheerleaders?

A. Yes. I think after the fifties, they all copied the idea of having cheers at wrestling matches, and they referred to them as mat maids,

greeting the teams and doing favors for the teams. They came in and made the athletes a little more comfortable.

Q. If you know, were you the first to do this?

A. I think so.

Q. Mr. Milkovich, did the wrestlers in 1951 have a place to practice their wrestling?

A. Yes, we practiced in the science room. And as a matter of fact, it was so small and uncomfortable, we thought it was dangerous, because we had mats next to the windows. The following year, they moved us into the cafeteria, and we still had the small mat, and I recommended a larger mat. They bought us a larger mat, and we moved into the cafeteria. Then, we were told to leave the cafeteria because it didn't meet the specifications of the sanitary people as far as wrestling in a cafeteria was concerned, in Columbus. Then, we moved on to the recreational room. Here again, that was such, it was too small and had windows, and we felt it was dangerous for the wrestlers to wrestle in this area. And of course, we began to win. Then, we moved up into the girls' gymnasium.

Q. When did you move to the girls' gymnasium?

A. Approximately 1955.

Q. And what was the performance of your teams from '51 to '55?

A. It really increased. We went undefeated, and we placed very high in the State Tournament that year.

Q. If you know, did Maple Heights accomplish this prior to your becoming coach in '51? If you know? They did not?

A. No.

Q. Now, Mr. Milkovich, did there come a time when you did go to the girls' gymnasium for practice?

A. Yes.

Q. Would you describe the size of that room?

A. I'd say the gymnasium was perhaps 80 by 50 feet.

Q. Did you have adequate equipment at that time?

A. Not when I got there, no, sir.

Q. Would you tell the Court what kind of equipment is used in training sessions, practice?

A. We've progressed from there to where several years ago, we passed a bond issue and built a new gymnasium. And I would like to feel the people of Maple Heights felt that the wrestling team was deserving of a better room, not only for wrestling but for music and gymnastics and other sports.

Q. Now, Mr. Milkovich, did there come a time your wrestlers were given other quarters other than the girls' gymnasium?

A. No, we moved from the girls' gymnasium to the new complex.

Q. When was that?

A. I'd say about six, seven years ago.

Q. Now, Mr. Milkovich, in this period of time around 1955, did you institute any other innovations in wrestling?

A. I went to work on the Junior High programs. I felt that all the other sports had a feeder system and why didn't wrestling. And I was able to —

Q. What do you mean by "feeder system"?

A. Where you take youngsters from the Junior High and teach them your sport and move them on to the JV and Varsity.

Q. Had this been done previously, if you know?

A. Not on the freshman level, no.

Q. From other high schools?

A. No. I think it was copied from Maple Heights freshman wrestling, Junior High wrestling, the way we distribute the weights. As a matter of fact, our weight distribution was adopted by the State of Ohio. And also, I insisted upon hiring people with wrestling backgrounds. I didn't want anybody to act as an adviser to wrestling in that capacity, because I thought it would hurt the program. And both the

freshman and the JV wrestling teams were highly successful. The only time they would lose a match is when they competed with one another. And I think this impressed a lot of the area schools to the extent that they said, "Why don't we have Junior High programs?" Look what they are doing at Maple Heights."

Q. How did your crowd attendance change, say from 1955, with all these innovations? Did you get increases?

A. Yes, we increaed from 25 or 30 in '51, '52, '53 and '54. I think we had some good seasons there where we had a capacity crowd almost every wrestling match.

Q. What was the capacity crowd?

A. In the small gym about 1,200, a thousand, 1,200.

Q. Did you after 1955 make any other innovations to wrestling at your school?

A. Yes. I organized, or helped organize a Dad's Booster Club. And the Dad's Booster Club was primarily organized to have a bus and chaperon the kids to Columbus. And as a matter of fact, I think it was — I can't remember what year in '50, but we sent something like ten bus loads of children with their parents and fans to Columbus, Ohio. And this so impressed the Board of Control, the High School Athletic Association, they said, "If this could happen in Maple Heights, we're just going to have to push wrestling in our other programs." And this has been copied in other schools where they had a Dad's Club that would work separately but yet, in conjunction with the regular Booster Club in the promotion of wrestling.

Q. Mr. Milkovich, if you know, were you the first of your kind to start that type of program?

A. Yes.

Q. Have other schools adopted that since?

A. Yes.

Q. Mr. Milkovich, in the course of your wrestling tenure as head coach of Maple Heights, will you tell this Court, commencing and say from 1950 to '55, and from 1951 to 1960, what kind of record did you

compile at that time? What were some of your achievements?

A. As a matter of fact, my first year, I think we won one and lost seven. Then we had wins and losses, 6-3, 9-2, 8-2, then an undefeated season. And I think we won our first State title in '57 or '56, and I think we won two back-to-back, then lost one. And in '60, '61 we may have won another two State titles back-to-back.

Q. In all those years, Mr. Milkovich, how many State titles did you actually win?

A. Ten.

Q. Mr. Milkovich, how many times did you place in the first three, your teams.

A. In the top three?

Q. The top three in Columbus.

A. I know we took second, nine times and third maybe a couple of times. I'm not sure.

Q. So you would be indicating about 22 times?

A. Yes.

Q. And would that be from 1951 until the time of your retirement?

A. Yes.

Q. So that you would have placed in the top three, 22 out of about 25 years?

A. Yes.

Q. Mr. Milkovich, what awards have you received from the community on a National or State level?

A. I received Mayor's Proclamations, Garfield Heights, Maple Heights, City of Cleveland. I received some awards from the Ohio High School Athletic Association, a Certificate of Appreciation at my testimonial dinner. I received a National Achievement Award for a hundred straight victories without a loss, from the "Scholastic Wrestling News."

Q. Is that unusual, a hundred straight wins?

A. Very unusual.

Q. Has anyone else, to your knowledge, ever accomplished that in high school?

A. I think there may have been another school in New York.

Q. In New York. You are referring to the entire country?

A. Yes.

Q. Please continue.

A. And I received the United States Wrestling Federation Award for helping a Russian wrestling team come to this country and compete with our wrestling teams. And I received the National Federation Award by the "Scholastic Wrestling News" for the hundred victories. I received a Rotary Club Award, Chamber of Commerce Award, Kiwanis Award, one from the Italian-American Democratic Club. These awards, incidentally, came in the sixties. Ohio State Senate Resolution Citation, honoring my entire family as champions. Maple Heights Board of Education Citation; I think this was in 1967. I received a Cuyahoga County Commissioners Plaque and Congressional Record Citation in 1972. And the Mayor proclaimed a Mike Milkovich Day by the City of Maple Heights and the citizens; I think this was in 1969. There was also a Resolution by the City of Maple Heights, by the House of Representatives, by the Ohio Senate. And I have also received the Kent State University Athletic Hall of Fame Award. While I was at Kent, I was captain, national champion. Ohio Wrestling Coaches Hall of Fame; I'm a charter member of that.

Q. What is that?

A. It's an honor given to the first four coaches that were put in the Ohio Coaches Hall of Fame for their achievements in wrestling and their contributions. And also, I received the Greater Cleveland Conference Coaches Award, also the Ohio Coach of the Year Award, and the distinguished Coaching Services Award presented by the National Council of State High School Coaches. And I was also awarded the Newsboy Classic Award by the Pittsburgh Press; this was for taking an Ohio team down, Ohio State, as I was told. And this was an award, I

was told, to get the wrestling champions of Ohio and take them to Pittsburgh for a meet against their champions, and the money derived from the meet was given to the crippled kids in the Pittsburgh area. And incidentally, this was a successful affair because they had almost 10.000 people in attendance.

Q. Is this an unusual crowd for wrestling?

A. Yes.

Q. Please continue.

A. And I received a National Coach of the Year Award by the National High School Coaches Association, and this was — I was selected the number one coach of the United States in wrestling.

Q. When was that?

A. 1976.

Q. Was this after the publication of the article which appears on that board?

A. Yes, sir. And at that time, I received a Super Bowl ring for this and also received a watch which says, "Milkovich with a Hundred Straight Victories," and an award. And also, I served on a number of national committees as President of the Greater Cleveland Conference Coaches and Officials Association; I believe that was 1965. And I was President of the Ohio Coaches Association; I think I served there from '72 to '74, and Vice President from '70 to '72. And I was the Ohio State High School Representative for wrestling. And also, I was on the Advisory Board for the Commissioner of Ohio High School Athletic Association. And I was also selected by the coaches as Northeast Ohio District Representative, the wrestling coaches of Northeast Ohio.

Q. Is this about the extent of your awards?

A. Yes, pretty much.

Q. Are there others which are noteworthy, in the interest of being brief?

A. Yes.

Q. Now, Mr. Milkovich, directing your attention to the year 1974, and directing your attention specifically to the night of the Maple-Mentor match, which was February 8th, if you recall, of 1974, would you tell this Court what occurred in the early part of the match? That is to say, up till the 138-pound class. Describe the events that took place.

A. The newspaper, I mean the Willoughby News Herald, or I read later, said it was a grudge match. This, in my opinion, was not a grudge match. As a matter of fact, in all the years I've been coaching, I never referred to any team as a grudge match.

Q. Where was this match characterized as a grudge match?

A. I think I read it in the Willoughby News Herald. And as a matter of fact, I had our girls —

Q. Excuse me. Who wrote the article.

A. Ted Diadiun. As a matter of fact, I had our girls bake a 4 by 8 cake. They baked it piece by piece and put it on a 4 by 8 piece of plywood and decorated it, for the purpose of after the match, we would invite the parents of both teams to have cake, and the Booster Club furnished drinks, and we would just have a hand-shaking contest after the match.

Q. Non-alcoholic I presume.

A. Yes. And before the match started, we introduced the parents of the wrestlers and the wrestlers.

Q. Excuse me a moment, Mr. Milkovich. Is this another innovation of yours, the parents?

A. Yes, I think it is?

Q. Tell us a little bit about that.

A. I think the cake idea is one of my big innovations, because I felt as though it brought people closer together. And I also had the girls bake a cake during the week, and particularly if we won a championship, we had a cake in the cafeteria which we would give every boy and girl in the school a piece of cake, sharing in the victory. And I felt as

though this kind of embellished the wrestling team. But getting back to the idea of walking down the aisle with your parents, introducing the parents and also the wrestlers, I kind of feel is one of our ideas.

Q. Did you do that that night?

A. Yes. And as a matter of fact, this one boy, as he walked down the aisle with his mother, I could hear, "She looks like a — "

MR. HERZER: Objection.

THE COURT: Sustained.

MR. SIMON: He may not testify as to what he heard, your Honor?

THE COURT: No. That's what somebody else said.

Q. Please continue.

A. And of course, after the people got to the end of the aisle, they filed back into the stands.

Q. And then at that point, did the match commence?

A. Yes.

Q. And what was your first weight class?

A. 98.

Q. Now, Mr. Milkovich, I'm going —

MR. SIMON: Mr. Occhionero, would you be kind enough to turn that blackboard around?

Q. Before I get into that, Mr. Milkovich, I want to ask one last question about your qualifications. How many champions are you responsible for at Maple?

A. Approximately 480 — some champions, individual meeting, State, District, AAU. As a matter of fact, I even coached the world championship team against Russia one...

* * * * *

Partial Transcript of Testimony of Michael Milkovich, Sr.
(April, 1978)
[Included in Joint Appendix at Request of Defendants]

CROSS EXAMINATION OF MICHAEL MILKOVICH

BY MR. HERZER:

Q. Mr. Milkovich, I think you testified, did you not, that with regard to the Ohio High School Athletic Association hearings, you did not attend the second hearing, the second meeting?

A. I think I did attend the second meeting.

Q. I think you did too.

I hand you what has been labeled as Plaintiff's Exhibit F. I direct your attention to the Maple Heights portion. Does it refer, Mr. Milkovich, to your being in attendance there?

A. Yes.

Q. Mr. Milkovich, you indicated that you presently reside in Maple Heights; correct?

A. Yes.

Q. Do you also own a home in Florida?

A. Yes. I have a condominium.

Q. A condominium?

A. Yes.

Q. Do you also own a cottage in Canada?

A. Yes.

Q. Do you own real estate in other parts?

A. Yes.

MR. SIMON: Object. What is the relevance of that?

MR. HERZER: I'm sorry?

THE COURT: I don't know where he is going. I have to give him a chance.

Q. I'm sorry, Mr. Milkovich.

A. Yes.

Q. Where is this real estate located?

A. In Olmsted Falls.

Q. Is that all the real estate you own?

A. Yes.

Q. Now, how much time to you spend living in Florida each year, Mr. Milkovich?

A. I've gone down there on vacation two or three weeks at a time during the summer. This year, I went down in January.

Q. And how long were you there?

MR. SIMON: Your Honor, I'm going to object to this line of questioning.

A. About three weeks.

MR. SIMON: I don't know where he is going, but it's irrelevant.

MR. HERZER: I'm trying to establish where he spends most of his time.

MR. SIMON: That doesn't have anything to do with the issue.

MR. HERZER: Where he went into retirement? I think it sure does.

Q. How long have you owned your condominium down in Florida?

A. Three years.

Q. About when did you purchase it?

A. About three years ago.

Q. Excuse me. About what month? 1975, would it have been? 1974?

A. Yes, could be '74.

Q. Did you purchase the real estate in Florida, the condominium —

A. Yes.

Q. — in anticipation of retirement?

A. Yes.

Q. And how long have you owned your cottage in Canada?

A. Since 1950.

Q. Do you spend much time up there each year?

A. I used to go up there for the summers.

Q. Do you still go up there for the summers?

A. Yes, for a couple of weeks, a month.

Q. Do you plan to move to Florida and live full time in Florida in the near future?

A. I don't know yet. I haven't decided, really.

Q. What about Canada?

A. I like to go up there for a month or so, yes.

Q. Now, you indicated, Mr. Milkovich, that you retired, I believe it was in July of 1977; is that correct?

A. Yes.

Q. How old were you when you retired?

A. Fifty-five.

Q. Upon your retirement, were you given any retirement awards or parties?

A. Yes.

Q. Can you describe for us what retirement awards, parties, commendations you were given?

A. Yes. At the Blue Grass, I received a Mayor's Proclamation.

Q. Pardon me? You said at the Blue Grass?

A. Yes.

Q. What is the Blue Grass?

A. A night club in Maple Heights.

Q. And when did this take place?

A. The spring of '77. I receive a Mayor's Proclamation. I received a Resolution from Mary Oakar, a letter from Dennis Kucinich, and some other people.

Q. Were there any other retirement parties or awards, commendations?

A. I received a gift from the Booster Club, I think, by the fellow that handled — he's the President of the Booster Club.

Q. You received a gift from the Booster Club?

A. Yes.

Q. It was the Maple Heights Booster Club?

A. Yes.

Q. And what was the gift?

A. A check.

Q. A check?

A. Yes.

Q. For how much?

A. I think it was $500.00.

Q. You say you think?

A. Yes.

Q. Do you know for sure?

A. Yes.

Q. It was $500.00?

A. Yes.

Q. Did you receive any other money for retirement?

A. No.

Q. Did you receive any other prizes or gifts for retirement?

A. No, I can't think of any.

Q. Did you receive anything from the Maple Heights School Board for retirement?

A. There is a severance pay that they give you.

MR. SIMON: I'm going to object to that, your Honor. What does the severance pay have to do with that?

MR. HERZER: I won't inquire further.

Q. I asked if they gave you any other commendations or awards, the Maple Heights School Board.

A. I can't think of any.

Q. Now, when you were a teacher at Maple Heights, what subject did you teach?

A. Driver Education.

Q. And then, I understand that you also ran a private driver education school?

A. Yes.

Q. And do you continue to run your private driver education school?

A. Yes.

Q. And how many students did you have in the driver education school for the year 1977? Do you recall?

A. Probably 15 or 20.

Q. 15 or 20?

A. Yeah.

Q. How about 1976?

A. Probably about the same amount.

Q. How about 1975?

A. I think I had a whole lot more.

Q. A whole lot more in '75?

A. Yeah.

Q. What about so far this year, in '78?

A. I have had three or four.

Q. Three or four this year?

A. Yes.

Q. Where do these students in your driver school come from?

A. Maple Heights, Bedford, or Garfield.

Q. And is that the general area you draw from —

A. Yes.

Q. — since the inception of the driving school?

A. Yes.

Q. When did the driving school start?

A. Well, you do this in the evenings or Saturdays or Sundays.

Q. What year did you start? Do you recall?

A. Sometime in the fifties.

Q. Mr. Milkovich, with regard to your retirement, isn't it a fact in early 1975, prior to the publication of the article in question, that you planned to retire in the near future?

A. Yes.

Q. Now, as the wrestling coach of Maple Heights High School, is it fair, or would you categorize or characterize your tenure as wrestling coach as being extremely successful?

A. Yes.

Q. And that characterization would apply to the 27 years that you were the wrestling coach; is that correct?

A. Yes.

Q. When you retired in July of 1977, isn't it a fact, no other wrestling coach in the State of Ohio has come close to your won-loss record?

A. Yes.

Q. Do you know what your won-loss record is?

A. Probably 265 wins against 25 losses.

Q. 25 losses?

A. Something like that, yeah.

Q. Do you know of any other wrestling coach in the United States that's come close to a record like that?

A. No.

Q. Isn't it a fact, Mr. Milkovich, you claim to be Ohio's number one high school wrestling coach?

A. That I claim it?

Q. Yes.

A. I suppose.

(Defendants' Exhibit 11, being a brochure, was marked for identification.)

Q. Mr. Milkovich, I will hand you what has been labeled as Defendants' Exhibit No. 11.

A. Yes.

Q. Can you identify that for us?

A. Yes.

Q. What is that?

A. It's publicity for my wrestling clinic.

Q. And who makes that publication? Who publishes what is entitled —

A. I beg your pardon?

Q. Is it your wrestling school that publishes that?

A. No. I have a fellow that does it.

Q. In there, does it refer to you as being "The nation's outstanding wrestling family"?

A. Yes.

Q. And do you agree with that statement?

A. Yes.

Q. In the brochure, does it have a picture of you and your sons?

A. Yes.

Q. Does it refer to you as being "Ohio's No. 1 high school coach?

A. Yes.

Q. Do you know when this was published?

A. 1976.

Q. After the article in question; is that correct?

A. Yes.

Q. Now, Mr. Milkovich, on direct examination, you referred in testifying to your voluminous achievements over the years. You referred, to refresh your recollection with a couple pieces of paper —

MR. HERZER: May I see those, please?

(Defendants' Exhibit 12, being a list of Coach Milkovich's achievements, was marked for identification.)

Q. I'll hand you, Mr. Milkovich, what is now labeled as Defendants' Exhibit No. 12. Would you tell the Court just exactly what Exhibit 12 is?

A. It states some of the stuff that I have won.

Q. It's not all —

A. Championships and contributions to wrestling.

Q. Is it all inclusive of your awards?

A. It comes pretty close, yes.

Q. Who wrote or prepared that documdent?

A. First of all, it was kept by Doc Wylie, the Athletic Director. He said "Look. Why don't you keep track of it, and at the end of the season, give it to me for our files, our Athletic Department."

Q. What was the purpose of the exhibit being prepared?

A. One of the reasons is, when you are asked for a clinic, they ask for publicity on you for the coaches. You give it to them for the publicity that you are coming to the school to put on a clinic.

Q. Now, what clinics may have received, to your knowledge, that publication, that exhibit?

A. Any clinic, I'd spoken at.

Q. Is there a date on this, Mr. Milkovich?

A. March 31, '77.

Q. So you apparently have spoken to numerous clinics.

A. Yes, down through the years.

Q. That's dated March 31, 1977?

A. Yes.

Q. So since March 31, 1977, you apparently have spoken at numerous clinics; is that correct?

A. Not numerous, no.

Q. Well, how many?

A. I'd say two or three.

Q. Two or three?

A. Yes.

Q. Can you give us a listing of those two or three?

A. At John Carroll, and one in South Carolina about two years ago.

Q. Excuse me. This is since March 31, 1977, I think or that's the date, is is not?

A. Yes.

Q. Which clinics since then?

A. The South Carolina Clinic.

Q. Is that the only one?

A. And John Carroll I mentioned, yes.

Q. Tell me a little bit about the South Carolina Clinic. Approximately when did the clinic take place?

A. Clinics usually take place in the springtime or before the start of the wrestling season.

Q. And how long was the clinic?

A. Three days. Some clinics last three days, some last a whole week.

Q. Were you one of the lecturers at the clinic?

A. Yes.

Q. Were there other lecturers too?

A. Yes.

Q. Can you tell me where these lecturers came from, if you know?

A. My lectures?

Q. The other lecturers, fellow lecturers.

A. Either comes from other schools that either represent wrestling —

Q. Throughout the United States?

A. Yes.

Q. And what did you, in particular, lecture on, Mr. Milkovich?

A. Promotional wrestling, takedowns.

Q. Is a takedown a wrestling technique?

A. Yes.

00Q. And what about the John Carroll Clinic?

A. I think I had standups there, on standup.

Q. And approximately when was this clinic?

A. '75, '76, somewhere in there.

Q. Again, I'm referring to on or after March 31st of '77. It probably was after that; is that correct?

A. I didn't have any clinics after '77.

Q. Well, tell me, then, about the John Carroll Clinic, please.

A. I was assigned a standup, the standup portion of it, and the promotion wrestling.

Q. Do you know how you were chosen to be a lecturer at the John Carroll Clinic?

A. I was chosen by the coach.

Q. The coach at John Carroll University, or college?

A. Yes.

Q. Were you paid for this?

A. Yes.

Q. Can you tell me how much you were paid?

A. I think a couple hundred dollars.

Q. Can you tell me how you were chosen for the South Carolina Clinic in '76 or '77?

A. By a group of coaches.

Q. What was this group of coaches?

A. The Carolina Coaches Association.

Q. The Carolina or South Carolina?

A. Yes.

Q. Which one, or both?

A. I think South Carolina.

Q. The Coaches Association picked you for the clinic; is that correct?

A. Yes.

Q. Can you tell me, going back to the John Carroll Clinic, how long was the clinic?

A. It was a weekend clinic.

Q. And how many courses did you teach?

A. It wasn't courses.

Q. How many lectures?

A. It's one or two hours. That's about it. Other coaches are allotted two or three hours; another coach, a couple of hours.

Q. How many other lecturers were at that?

A. Three or four.

Q. Where were they from? Do you know?

A. One was from Indiana, one from Oklahoma.

Q. And the other one?

A. I don't remember.

Q. Now, that exhibit being dated March the — whatever it was, 31, 1977, can you tell me what clinics that document was sent to, or don't you know?

A. You don't send this unless they asked for it.

Q. Was it asked for on or about March 31st?

A. Yes, because they publicized this for the coach's information.

Q. May I have this, please? Thank you.

Mr. Milkovich, in the exhbiit, it states that, "Coach Mike Milkovich has established himself with a sensational and almost unbelieveable record in wrestling that can hardly be compared with any other coach in the country."

Would you agree with that statement?

A. Yes.

Q. One other statement I'll ask you about in here, Mr. Milkovich.

It also says that, "All of Milkovich's coaching endeavors did not go unnoticed by the public." Let me repeat that. "All of Milkovich's coaching endeavors did not go unnoticed by the public."

Do you agree with that statement too?

A. Yes.

Q. Mr. Milkovich, I don't recall your saying, and this is why I am asking, are you a member of the Ohio High School Hall of Fame?

A. Yes.

Q. I understand you are a charter member of that organization?

A. Yes.

Q. And what does that mean, "a charter member"?

A. I was one of the first coaches selected for the honor.

Q. When were you so selected?

A. I think around 1969.

Q. By whom were you chosen? Do you recall?

A. By the Ohio Coaches Association.

Q. Pardon me?

A. By the Ohio Coaches Association.

Q. Are you also or have been inducted into the Helm's Foundation Amateur Wrestling Hall of Fame?

A. Yes.

Q. Can you tell me what that organization is?

A. The Helm's Hall of Fame recognizes all amateur coaches throughout the United States, and your name is submitted by a state organization, meaning our High School Coaches Association.

Q. And when were you inducted into this Hall of Fame?

Q. I think 1970, '69. I'm not sure of the date.

Q. Another one I didn't hear that I want to ask you about is the National Council of High School Coaches award. Did you receive that?

A. Yes.

Q. Can you tell me what that award is?

A. You name is submitted to this council, again, by the State Coaches Association for your contributions to wrestling.

Q. An how are you chosen?

A. By the coaches.

Q. The Ohio coaches?

A. They submit your name, yes, to this body.

Q. I see, which is the National Council?

A. Yes.

Q. And for the record, Mr. Milkovich, when were you so inducted?

A. For this National Council?

Q. Yes.

A. I think in '69, '70, somewhere in there.

Q. You also indicated on direct examination, you were honored

by the Ohio House of Representatives and the Ohio Senate; is that correct?

A. Yes.

Q. And when were you so honored there?

A. I'd say I received a Resolution in 1967, '68.

Q. Why were you so honored?

A. Because of the team's accomplishments.

Q. You've been honored by the Cleveland City Council; is that correct?

A. Yes.

THE COURT: May I see counsel?

(The Court and counsel conferred at the bench, out of the hearing of the jury and this reporter.)

MR. HERZER: Would you read the last question back to me, please?

(The last question was read.)

Q. Why were you so honored by the Cleveland City Council?

A. For winning, I think, four consecutive state titles in the sixties.

Q. Now, since the publication of the article in question, you were honored — I think you testified — by, or you won the National Coach of the Year award?

A. Yes.

Q. And this was in Portland, Oregon?

A. Yes.

Q. Were you also honored or your family honored as the wrestling family in Tucson, Arizona?

A. Yes.

Q. Can you tell me about that?

A. They published an article on the entire family in the NCAA Wrestling, regarding the tournament.

Q. What year was this, Mr. Milkovich?

A. It's a program that has all of the wrestlers, history of wrestling and the people involved with wrestling, and our picture and stories about the kids appeared in the magazine. It's not a magazine. It's a program.

Q. Your picture appeared?

A. Yes, the entire family.

Q. What year was this?

A. About three years ago.

Q. 1975?

A. Yeah.

Q. Now, Mr. Milkovich, on direct examination, you testified that you had introduced numerous innovations in Ohio high school wrestling since you started coaching in 1950; is that correct?

A. Yes.

Q. And one of these was the institution of cheerleaders and cheers?

A. Yes.

Q. What was the purpose of the cheerleaders and the cheers?

Q. I tried to have it compared to basketball, because basketball had cheerleaders, and I think they dressed up the program.

Q. Did they direct their cheers to the wrestlers or to the crowd?

A. To both.

Q. An you also had a, as I understood it, a book of cheers that you made up?

A. Yes.

Q. But is was intended — the cheerleaders were intended to get the crowd behind the wrestlers; is that correct?

A. Right.

Q. Do you feel it's important for the crowd to be behind the wrestlers?

A. Yes.

Q. Do you feel it stimulates the wrestlers, crowd reaction?

A. I think a crowd stimulates any athletic event, period. Why have an athletic contest when you don't have a crowd cheering?

Q. You indicated that many of your wrestling innovations have been adopted statewide?

A. I think they have been copied, yes.

Q. Has the copying of your wrestling innovations made your competition stronger in your opinion?

A. I don't know whether it made it stronger, but it popularized it. You see, I think schools began to realize they only had only really big sports for big kids, football or basketball. But in wrestling, you had 98, 150-pounders. I think a wrestler felt out of place, because a football or basketball player was cheered. And it was fitting to have cheers at wrestling.

Q. Do you have any opinion, Mr. Milkovich, as to the role that the wrestling coach plays in crowd control.

A. Yes.

Q. What is that opinion?

A. What do you mean, "crowd control"?

Q. Well, I thought you had an opinion on it.

A. I don't know exactly what you mean.

Q. In your experience as a coach, a wrestling coach of some 27 years, do you feel that the coach's actions and commencement of the meet to the end of the match have an effect on the crowd?

MR. SIMON: Object. It calls for a conclusion.

THE COURT: If he has an opinion, he may express it.

A. I think if the coach shows he's happy the kid has won, the crowd feels happy that he has won.

Q. And if the coach shows disgust?

A. I would say this: At Maple Heights, there is crowd that has been following this a long time. They know wrestling. They know whether a guy is good or bad.

Q. Does the Maple Heights crowd respond to your gestures?

A. What do you mean, "do they respond"?

Q. I'm saying, do they respond to your gestures?

A. They cheer. They cheer all the time.

Q. When you gesture, do you notice the crowd ever responding to them? Ever notice the crowd — is your answer no to that?

MR. OCCHIONERO: Please allow the witness to answer.

MR. SIMON: He's nodding his head negatively.

A. Really, when you are in the coaching business, your primary job is the kids, really, getting through to them.

Q. I understand that.

A. Winning the match.

Q. I understand that. But will you answer the question?

A. What was the question again?

MR. HERZER: Will you read the question back?

(The last question was read.)

Q. When you gesture.

A. What are you talking about, me gesturing?

Q. When you wave your arms.

A. How do I wave my arms?

Q. You pick the way.

A. My crowds have watched me for many, many years.

Q. Do you ever see the crowds mimicking or aping your gestures?

A. No. I'll say, "Two points" once in a while, and for example, "Takedown," "Sit." I say to myself, "That's a two-point move." By the time a boy gets thrown on his back, I say to myself, "That's a five-point move, " because a takedown is worth two points, and —

Q. Do you seek the crowd mimicking?

A. I'm right in here. I'm usually sitting. I say "two." This is a common occurrence if you watch basketball.

Q. I'm not talking about basketball. I'm asking if you saw the crowd mimicking.

A. Sports is no different. You may say, "Two points" —

Q. Did you ever see the crowd mimicking you when you do that?

MR. SIMON: Do what, Mr. Herzer?

MR. HERZER: Raise his two fingers, just what he indicated.

Q. You either know or you don't know.

A. They may.

Q. Do you agree with the statement that, "Mike Milkovich took wrestling for a nonentity and put Maple Heights High School on the map."

Do you agree with that statement?

A. Yes.

Q. Now, directing your attention to the wrestling match with Mentor on February 8, 1974, isn't it a fact that the year before, Mentor had ended Maple Heights' ten-year winning streak?

A. Yes, sir.

Q. How many ten-year winning streaks have you had in your career?

A. I'm only 55 years old.

Q. Not many then?

A. Right.

Q. That's just my question.

A. Yes. They didn't end my ten-year winning streak, no. Garfield Heights did.

Q. Mentor did not.

A. No.

Q. Had Mentor beaten you the year before?

A. Yes.

Q. And you only lost 23 or 24 other dual meets; is that correct?

A. Yes.

Q. Did Mentor end the ten-year conference winning streak?

A. Yes, could have.

Q. They could have.

A. Yes.

Q. They did.

A. They could have.

Q. Now, in the controversial match in question, where the Maple boy committed the foul on the Mentor boy, did you think the Mentor boy was really hurt?

MR. OCCHIONER: Objection.

THE COURT: He's the coach with 27 years' experience.

A. Yes, I'll answer it. He could have been hurt, yes, but he could have continued the match too, because there is many meets where there is a foul inflicted and a point awarded. I've seen this many times in tournaments, and they continue wrestling. And if they can't continue, the match is forfeited.

Q. You felt the boy could have continued wrestling?

A. Yes.

Q. Didn't you state that every athlete has to learn to compete under physical duress?

A. Yes.

Q. Isn't that part of the game?

A. Yes.

Q. Now, during the evening of the match, I think you testified that the gymnasium or the stands were totally filled to capacity; correct?

A. I don't think it was filled to capacity, no.

Q. Do you know approximately how many Maple or how many Mentor people were there?

A. I have no idea.

Q. Do you know whether the Maple people would have been sitting on the Mentor side of the stands?

A. There could have been some, yes.

Q. Generally speaking though, Mr. Milkovich, you indicated you use a lot of gestures during any given match; is that correct?

A. I beg your pardon?

Q. Generally speaking, you use a lot of gestures during any given match, pointing to the head?

A. Yes, yes.

Q. Now, with regard to the 155-pound match, you were quite upset about the decision, were you not?

A. Yes.

Q. This had been the first loss for your wrestler that year, Mr. Girardi?

A. Yes.

Q. And he was leading by a substantial margin at the time?

A. Yes.

Q. He was going to win the match but for that foul?

A. Yes.

Q. Certainly, the wrestler was upset by the decision. Certainly, your wrestler was upset by the decision.

MR. SIMON: Objection.

THE COURT: Sustained.

Q. Did your wrestler do anything that would inidicate to you that he was upset with the decision?

A. Yes.

Q. What did he do?

A. He kicked his helmet.

Q. Did he throw it over his head?

A. He picked it up — I didn't see him throw it down, but I saw him kick it when he walked by.

Q. What was your reaction to that?

A. When something like this happens, I tell him, "Young man, you are violating the rule."

Q. That's what you told Mr. Girardi?

A. Yes. Whenever a wrestler got out of line, I always told him right away and reiterated the same thing the following Monday.

Q. So whenever a wrestler got out of line, you were quick to correct him on it?

A. Yes.

Q. Wasn't your son Mike, Jr. a Maple Heights Junior Varsity wrestling coach at this time?

A. Yes.

Q. And isn't it a fact that at the time that you were conferrring with Coach Schonauer after the foul, that your son Mike, Jr. was over there by you?

A. Yes

Q. Was he?

MR. SIMON: I'm going to object to this line of questioning with Michael Milkovich, Jr. There is no relevance to prior testimony or relevance to this case.

MR. WICKENS: We haven't put our case on yet.

THE COURT: Continue.

MR. HERZER: Would you read the last question?

(The last question was read.)

A. Yes.

Q. Isn't it a fact he ran over from the junior varsity match to the varsity match?

A. Yes.

Q. Is that where he is supposed to be?

A. He belongs at the JV match.

Q. Did you instruct him to go back either that day or the next Monday?

MR. SIMON: Object, your Honor. Where is he going with this?

THE COURT: I don't know, but it is cross. Continue.

Q. Did you instruct him to go back?

A. Really, I didn't pay any attention to him.

Q. What was he doing? Do you recall?

A. I think he came over to see if the Mentor boy was injured.

Q. That's all?

A. Well, he said, "Dad, I think he can wrestle. He's not hurt."

Q. Was he shouting?

A. No.

Q. Was he waving his arms?

A. No.

Q. Was he kicking?

A. No. I didn't notice.

Q. Now, you felt that the injured Mentor wrestler could have continued wrestling?

A. Yes.

Q. Did you urge the boy to get up, the Mentor wrestler?

A. No.

Q. You didn't waive your arms, moving your arms, moving him from a downward to an upward position?

A. No.

Q. Did you make any gestures with regard to your desire for the Mentor wrestler to get up and wrestle?

A. No.

Q. You just stood there with your hands in your pockets?

A. Yes.

Q. Did you have a look of disgust on your face?

A. I may have.

Q. Did you shake your head?

A. Not that I know of.

Q. At the time that the Mentor wrestler was laying on the mat injured, did you gesture to the crowd for any reason?

A. No.

Q. Did you gesture to the bench, any of your benches, for any reason?

A. No.

Q. Did you gesture to any of the other wrestlers?

A. I can't recall, no.

Q. Are you aware of any action that the injured — that the Mentor wrestler took to indicate that he was playing possum?

A. He could have. I don't know.

Q. What gave you the notion that he could wrestle?

A. I've been in athletics all my life, and I have seen forearm blows for many years. And incidentally, I've seen a lot of injuries in my lifetime too. I have seen a lot of forfeits. I just felt as though he wasn't hit that hard. The kid was in violation of the rules. It was an illegal forearm blow.

Q. But you did feel he was playing possum and he could have continued:

MR. OCCHIONERO: Objection. That was not the witness' testimony about "possum".

THE COURT: He can deny or affirm that statement.

A. I don't know whether he was playing possum. I knew the score was such that he didn't want any part of the wrestling match thereafter.

Q. Do you know what class he was in in this school?

A. No.

Q. Was he a sophmore or junior?

A. I have no idea.

Q. When you were conferring with Coach Schonauer over the Mentor wrestler, did you use any profanity whatsoever when you were talking to Coach Schonauer?

A. No.

Q. Are you sure about that?

A. Yes.

Q. At the time, did you use any profanity in conferring with anyone in the area?

A. None at all.

Q. Now, turning to the Ohio High School Athletic Association hearings, you attended two of them, I think you know now; correct?

A. Yes.

Q. At the hearings, didn't you indicate to the Board that you were powerless to control the crowd?

A. Yes.

MR. SIMON: I would ask Mr. Herzer to indicate which hearing he means.

MR. HERZER: He answered "Yes."

MR. SIMON: Which hearing, the first or the second?

MR. HERZER: I said "At the hearings," and he said "Yes."

Q. Did you discuss your gestures before the Ohio High School Athletic Association Board at the hearings?

A. I think it was brought up.

Q. And how did you so classify or characterize your gestures?

A. The same as I did before, with my hands. I said, "Take your six points, and let's get on with the match."

Q. You demonstrated that to the Board; is that correct?

A. Really, I can't recall whether I demonstrated it to the Board.

Q. Let me ask you this question: Isn't it a fact that you characterized your gestures before the Board as just some "shrugs," your normal way of speaking?

A. I could have, yes.

Q. Now, when you were talking to Coach Schonauer regarding the injured wrestler, you just mentioned you told the coach what? "Fine. Take your six points"?

A. Yes, "Let's continue with the next match."

Q. Nothing more?

A. Nothing more.

Q. Now, I understand, Mr. Milkovich, that during or after the melee that happened that evening, you went to the public address system and made an announcement?

A. Yes.

Q. And what was that announcement?

A. I told them, if we didn't settle down, that we would empty the gym and continue wrestling without the fans.

Q. And who requested you to make that announcement?

A. Mr. Wylie and the Athletic Director from — we talked about it — from Mentor.

Q. Didn't Frank Fiore, the referee, request you to make that announcement?

A. No, I'm pretty sure Mr. Wylie told me. The Athletic Director came over. We had a meeting.

Q. Frank Fiore didn't tell you to do it then?

A. He may have said it, but I can't remember.

Q. You didn't do it on your own notion though"

A. No.

Q. You were told to do it?

A. Yes.

Q. And after you made the announcmeent, I think you testified that thereafter, the crowd was calm and quiet?

A. Yes.

Q. It was only after you were requested to make the announcement that the crowd became calm and quiet; it that correct?

A. They were calm. They were calm after it was all over with.

Q. And that's why —

A. After he got off the floor, they were calm.

Q. And that's why you went to the public address system?

A. I was told to go there by the Athletic Director, I suppose after he talked with Domokos and perhaps Fiore.

Q. That was how long after the melee started that you actually made the announcement on the public address system?

A. It may have been five minutes.

Q. Now, I'll direct your attention to your testimony before Judge Martin at the trial in November of '74. Didn't you testify that "Coach Schonauer, from Mentor, told the boy to lay down"?

A. Yes, he motioned to the boy to lay down.

Q. I said "told."

A. Yeah.

Q. Isn't it a fact, Mr. Milkovich, that you testified before the judge that, "The Mentor boy stood up, and I think the coach called for time out and told to boy to lay down."

A. Yes.

Q. Is that your testimony?

A. Yes.

Q. In other words, Coach Schonauer was telling the hurt wrestler that he should lay down?

A. Yes. Well, he probably told him to lay down. He probably gave him some smelling salts to see if he was dizzy.

Q. But the boy stood up, and your recollection is he said, "Lay down"?

A. When he was hurt, I think he got up and walked towards his coach. This normally happens if you are a great distance from the bench. The coach goes, "Lay down." He will take a look at you, look at the pupil of their eyes or —

Q. Didn't you also testify before Judge Martin that James Schonauer didn't want his wrestler to continue in the match?

A. Yes.

Q. And just so that we get it clear in our minds where you made the various statements, did you also testify before Judge Martin that after the foul of your wrestler, the only statement you made to Coach Schonauer was, "Fine. Take your six points, and let's get on with the match"?

A. Yes.

Q. This is your testimony before Judge Martin?

A. Yes.

Q. I'm going to direct your attention to another portion of your testimony before Judge Martin. You were asked on direct examination — I'll hand you what has been labeled, I guess it's "I." I direct your attention to Page 13 and on Page 16. First, we'll start with Page 16. Again, we're talking about your testimony before Judge Martin in this case; correct?

A. Correct.

Q. And the question put to you there was, "As far as you know, you didn't see any punching or fighting"; correct, punching or fighting?

A. Yes.

Q. And your answer was, "I didn't see anything"; is that correct?

A. I didn't see any punching.

Q. You said your answer —

A. Punching or fighting, an actual fist fight, hitting people in the mouth.

Q. I'm asking you what you told the judge.

MR. OCCHIONERO: Your Honor, the transcript speaks for itself.

THE COURT: He's using it for impeachment purposes I presume.

Q. The next question put to you by your counsel is, "How long did this altercation take place? Five minutes, ten minutes or what?" And your answer was, "It must have lasted about ten or fifteen seconds"; is that correct?

A. Now, ten or fifteen seconds with reference to when there was people coming on the mat?

Q. That's right, that was with regard to the spectators.

A. Yes.

Q. So when you were answering the question with regard to this altercation, you were talking about the spectators, it lasting about ten to fifteen seconds; is that correct?

A. Yes. It felt like ten or fifteen seconds to me, yeah.

Q. Sure. And when you were talking about not seeing any punching or fighting, therefore, you were talking about the altercation which referred to the spectators; is that correct?

A. Yes. I did not see any punches thrown.

Q. Or fighting. That's what you said before the judge; correct?

A. Yes.

Q. Now, isn't it a fact, Mr. Milkovich, that with regard to the Ohio High School Athletic Association hearings and the letter of censure that was issued, you made no response or denial or challenge of the letter of censure, did you?

A. None.

Q. Isn't it a fact that the matter of your censure was reported to the community?

A. Yes.

Q. Was it reported in the newspapers?

A. Yes.

(Defendants' Exhibit 13, being a newspaper article, was marked for identification.)

MR. SIMON: Could we approach the bench, your Honor?

THE COURT: Certainly.

(The Court and counsel conferred at the bench, out of the hearing of the jury and this reporter.)

Q. Mr. Milkovich, I'll hand you what has been labeled Defendants' Exhibit 13. Would you refresh your recollection regarding that, please?

A. Yes.

Q. Have you seen that article before?

A. Yes, I remember seeing it.

Q. Was that published in the Maple Heights community.

A. Yes.

Q. And — pardon me?

A. The South East Sun, yes.

Q. Is the South East Sun distributed to the Maple Heights community?

A. Yes.

Q. Do you recall when you saw the article in question, Defendants' Exhibit No. 13, in the South East Sun?

A. When it came out in the paper, I saw it. I don't know the date. March 7, 1974.

Q. Would you have seen it on or about that date?

A. Yes.

Q. Do you subscribe to the South East Sun?

A. Yes.

Q. What was your reaction to this article?

A. Actually, I didn't like it.

Q. Did it cause you to have any sleepless nights?

A. I felt bad about it, yes.

Q. Did it cause you to become curt with your family?

A. It may have.

Q. Did it cause you to become irritable?

A. It may have.

Q. Impatient?

A. It may have, yes.

Q. Did it cause you to lose weight?

A. I don't know.

Q. At that time, did you consult a physician or take pills?

A. Not at this time, no. I went to see a doctor about a week after this article.

Q. But you saw no physician after that article was issued?

A. No.

Q. Isn't it a fact that the fact of your censure was reported thoughout the State of Ohio?

A. Yes.

Q. And it was reported to the Maple Heights community?

A. Yes.

Q. I'll hand you what has been labeled as Plaintiff's Exhibit C. Can you identify that?

A. Yes. This is from Harold Meyer.

Q. Is that a copy of the letter you received?

A. Yes.

Q. Is that the letter of censure we're referring to?

A. Yes.

Q. After you received the letter of censure on or about March 15, 1974, did you receive any nasty telephone calls at two or three in the morning many times?

A. I could have, yes.

Q. Did you receive letters from people from Mayfield or Mentor or Willoughby regarding the censure?

A. I don't know about Mayfield or Mentor. They usually don't put a return address if there is a letter like that.

Q. But did you receive similar types of letters and telephone calls —

A. Yes.

Q. Pardon me?

A. Yes.

Q. — you say you received after the publication of the article in question?

A. Yes.

Q. Did you conceal the telephone calls and the receipt of the letters from your wife?

A. Yes.

Q. And these telephone calls were at two or three o'clock in the morning?

A. I never answered those. My wife would answer.

Q. But you did receive phone calls at two or three o'clock in the morning many times?

A. Yes, yes.

Q. After the letter of censure was published; is that correct?

A. I received some, yes.

Q. Mr. Milkovich, are you familiar with a publication entitled "The Ohio High School Athlete"?

A. Yes.

Q. And do you know where "The Ohio High School Athlete" — well, who publishes "The Ohio High School Athlete"?

A. The Ohio High School Athlete Association.

Q. The Ohio High School Athlete Association?

A. Yes.

MR. SIMON: I will object to that. The Court has ruled that he may only cover the minutes of that exhibit.

MR. HERZER: I am only asking about the publication in general.

THE COURT: Continue.

Q. Do you know if "The Ohio High School Athlete" is circulated throughout the State of Ohio?

A. Yes.

Q. And the Board minutes of the Ohio High School Athletic Association, are they contained in the publication?

A. Yes.

Q. Therefore, they are distributed throughout the State of Ohio?

A. Yes.

Q. With reference to your letter of censure —

A. Yes.

Q. — was it found in "The Ohio High School Athlete"?

A. Yes.

Q. And was it therefore distributed throughout the State of Ohio?

A. Yes.

Q. Did you get any response from anyone in the State of Ohio with regard to the Board minutes of your censure?

A. I can't remember.

Q. Didn't you, Mr. Milkovich, relate your account of the wrestling match, the melee and all the related events, to the Ohio High School Athletic Association at its hearings?

A. At the first hearing?

Q. At its hearings, plural.

A. No, not at the first hearing, no.

Q. What about the second hearing?

A. No, I don't think we presented all of the evidence, the film.

Q. Did you present any account of the wrestling match, the melee and the other events, before the Ohio High School Athletic Association?

A. Not in its entirety, no.

Q. But you did present some account; is that correct?

A. Could have been, yes.

Q. But not all of it?

A. Right.

Q. Could you have presented some account of the wrestling match, the melee and related events, to Judge Martin?

A. Yes.

Q. Did you present all of your entire account before Judge Martin?

A. I thought I gave most of it, yes.

Q. So there were things you presented to Judge Martin you did not present to the Ohio High School Athletic Association?

A. Yes.

Q. Your testimony was different before Judge Martin than it was at the Ohio High School Athletic Association?

A. It was different but —

Q. Was it different?

A. I don't know.

Q. You don't know? You were at those places.

A. No, because we didn't go over — we didn't exhibit the film. We didn't bring any referee.

Q. True, true. But your account you presented to Judge Martin, therefore by necessity, was different than the one that you presented to the Ohio High School Athletic Association?

A. It was more thorough, yes.

Q. Who had the film at the time of the hearings before the Ohio High School Athletic Association?

A. I think our Athletic Director had it.

Q. Did you ask your Athletic Director to bring this?

A. The superintendent asked him. I had nothing to do with the film.

Q. I didn't even finish my question. Did you ask the keeper of the film to bring it to the hearings at the Ohio High School Athletic Association?

A. No, I didn't.

Q. You testified on direct examination that since the article in question, I guess you said you lost your zest for coaching?

A. Yes.

Q. You do, however, conduct coaching clinics in the summer, don't you?

A. Yes.

Q. You have conducted them since the publication of the article, haven't you?

A. Yes.

Q. You started them, in fact, the coaching clinics; is that correct?

A. Yes, yes.

Q. Are you planning to have another wrestling clinic this summer?

A. Yes. I may add, there was different temperament —

Q. Excuse me. You can respond to my questions, and you can get into it from that angle.

Now, is what you told the Ohio High School Athletic Association substantially the same as what you told Judge Martin at the trial?

A. Yes.

Q. But you told Judge Martin some other things; is that correct?

A. We had, yes, more information.

Q. Did I hear your correctly, Mr. Milkovich? Did you say as a result, or did you say after the article in question, in January of '75, that you lost confidence in yourself as a coach?

A. Yes.

Q. You did?

A. Yes.

Q. Yet, you held yourself out as the number one wrestling coach in America at that time; correct?

A. Yes, yes. I felt —

Q. Well, I'm asking you the question on this. You said that — I thought you said you began to maybe think that some of the matter published in the article were true.

A. No. I just felt bad because of the article, after a long career that something like this would be published about me.

Q. Well, there were many, many articles over the spans of your career that were published about you, weren't there, Mr. Milkovich?

A. Yes.

Q. And you mean to tell me that all of them were good?

A. They weren't of this caliber.

Q. Were they all commenting on you in a favorable light?

A. Usually, most of the articles had to do with winning a state championship or winning a dual meet, had so many victories or a win streak.

Q. Do you have any idea how many hundreds of articles have been published about you, national coach of the year, over the course of your wrestling career as a coach?

A. Yes, sir. There has been a lot of articles.

A. And every one of them has been favorable?

A. I don't know if every one was favorable. I don't even think I read them all.

Q. Well, let me ask you this: Have you retained your enthusiasm for coaching?

A. No.

Q. And you've retired?

A. Yes.

Q. And you plan to retire?

A. Stay retired, yes.

Q. You had planned to retire before the publication of the article in question.

A. Yes, I planned it.

Q. Isn't it a fact, Mr. Milkovich, that your salary as a wrestling coach did not decrease after the publication of the article in question? Isn't it a fact that it increased?

A. We had increments every year in high school. It was across-the-board raises for the entire faculty.

Q. You weren't denied any of these raises, were you?

MR. SIMON: Let the record indicate he nodded his head negative.

Q. In consequence for publication of the article in question, you sustained no financial losses, did you?

A. Regarding the article?

Q. Yes. Isn't that what you told us a couple of days ago under oath?

MR. SIMON: Object to that.

A. Really, I have no way of evaluating.

Q. I'm talking about financial loss.

MR. SIMON: The gist is made of "under oath."

THE COURT: Didn't we have an interrogatory?

MR. SIMON: Are you referring to interrogatories, Counselor?

MR. HERZER: Yes.

MR. SIMON: Withdraw that.

Q. Isn't it a fact you suffered no financial loss as a result of the publication of this article?

A. I don't think I'm in demand, for example, as an after-dinner speaker.

MR. SIMON: He's answering the question.

MR. HERZER: Let me put the question to you in this way: Under oath on April 11, 1978, didn't you respond that you had suffered no financial losses at this time, there were none?

A. All right. There were none.

Q. There were none.

Didn't you also respond that you had no cancellations of employment or income producing activities?

A. Yes.

Q. As a result of the publication of the article?

A. None.

MR. SIMON: You Honor, I'm going to object to counsel's line of questioning. I think he's misquoting the interrogatories.

MR. HERZER: I'm asking him — do you want to approach the bench?

MR. SIMON: Yes, I do.

THE COURT: Why don't we discuss it in chambers? Ladies and gentlemen of the jury, at this time, we'll recess until 9:00 a.m. tomorrow morning.

You are again reminded not to discuss the case, also not to read any newspaper accounts or listen to any radio accounts.

*****

THEREUPON, an adjournment was taken to 9:00 a.m. the following day, at which time the following proceedings were had in the presence of a jury:

FRIDAY, APRIL 14, 1978

(CONTINUED) CROSS EXAMINATION OF MICHAEL MILKOVICH

BY MR. HERZER:

Q. Mr. Milkovich, first, I'll hand you what has been labeled Plaintiff's Exhibit E. These, I believe, are the Board minutes, the OHSAA, from February 28, 1974. Would you take a look at both of those pages, just to refresh your recollection?

Mr. Milkovich, on the second page is where it refers to Maple. Was that the meeting before the OHSAA? Was February 28, 1974, was that the meeting you attended?

A. Yes.

Q. So that was February 28, 1974.

A. That was the first meeting.

Q. That's right.

(Defendants' Exhibit 14, being an Ohio High School State Wrestling Meet brochure, was marked for identification.)

Q. Now, I'll hand you what has been labeled Defendants' Exhibit 14 and direct your attention to the face sheet. Can you tell us what that is, please, Mr. Milkovich?

A. That's a high school program at the Ohio State Wrestling Tournaments.

Q. Is that the Ohio State Tournament?

A. It's just a program regarding the tournaments.

Q. And for which tournament? What year?

A. Marth 8th and 9th, Friday and Saturday of '74.

Q. Of 1974. So then, the State Tournaments were on March 8th or 9th, 1974; is that correct?

A. This year, yes.

Q. That year. Can you tell me, then, when the District Tournaments would have been, if the State Tournaments were on March 8th and 9th?

A. Probably a week before that.

Q. March 1st and 2nd; correct?

A. Yes, they vary every year.

Q. Can you tell me who it shows as the 1973 State Triple A wrestling champ, which school?

A. Ravenna won the Double A, and Elyria won the Triple A.

Q. Maple Heights did not win the Triple A in 1973; is that correct?

A. No.

Q. The year of the District, or the day of the District Tournament, which was 1974, which you indicate would have been about March 1st or 2nd, a week before, do you recall walking into the District Tournament late because you had attended the OHSAA hearing in Columbus that day?

A. No, I don't recall whether it was late or not. I can't recall.

Q. Do you recall attending the Ohio High School Athletic Association on the same day that the District Tournament was held?

A. I know I came in late, but I just can't remember all the dates.

Q. Mr. Milkovich, I will direct your attention to your testimony on direct examination, where you indicated that the Rochester Wrestling Clinic, or whatever, has not called you for any speaking engagements or lectures, or what have you, in 1975 or 1976. Do you recall that testimony?

A. Yes.

Q. Have they called you for '77?

A. No.

Q. '78?

A. No.

Q. Mr. Milkovich, do you recall on or about April 11, 1978, being asked this question through interrogatories:

"In consequence of the publication of January 8, 1975, which is the subject of this lawsuit, have you ever suffered the cancellation of a speaking engagement or the cancellation of a contract?"

Do you recall that question?

A. Yes.

Q. Do you recall what your answers was? Do you recall you answered "No"?

A. Yes, if it says so.

MR. SIMON: What item is that, Mr. Herzer?

MR. HERZER: It's in the interrogatories.

MR. SIMON: Which question is that? I want to make sure you quoted it correctly.

MR. HERZER: 9-C, Page 7 of 11.

MR. SIMON: That's correct.

Q. Now, with regard to the letter of censure, which was issued by the Ohio High School Athletic Association, didn't you also state that the Cleveland Plain Dealer published an article about this letter of censure?

A. I think they did, yes.

Q. In 1975, Mr. Milkovich, where did Maple Heights finish in the State Wrestling Tournament? Didn't you state second place?

A. It could have, yes. I'd have to look up the dates.

Q. Do you know whether in 1975 —

A. I'd have to look it up. If I had a score book, I could look it up.

Q. Let me ask you this question: Isn't 1975 when you were supposed to be losing your coaching abilities?

A. I beg your pardon?

Q. Isn't 1975 when you were supposed to be losing your coaching abilities?

A. I would say this: I was less enthusiastic about coaching.

Q. But you still finished second in the state; isn't that correct?

A. Yes.

Q. Can you tell us who Frank Fiore is?

A. Referee.

Q. Isn't it a fact that Frank Fiore, the referee has been employed or engaged by you or your wrestling clinic?

A. No. He isn't employed by my clinic, no.

Q. Engaged by it?

A. I bought T-shirts off of a — there are referees and a couple of coaches that have a firm that makes athletic goods, and I bought some T-shirts off of them.

Q. And Mr. Fiore has an interest in that firm that you bought T-shirts from?

A. Yes.

Q. Has he ever been an instructor at any of your wrestling clinics?

A. No.

(Defendants' Exhibit 15, being a Lorain County School of Wrestling Camp leaflet, was marked for identification.)

Q. Mr. Milkovich, I'll hand you what has been labeled Defendants' Exhibit 15, and particularly direct your attention to the last notation under the name of Frank C. Fiore, Camp Director.

THE COURT: Would you ask him to identify the document?

MR. OCCHIONERO: Can he identify the document, your Honor?

Q. Can you identify that document for us, Mr. Milkovich?

A. "Lorain County School of Wrestling Camp."

Q. And can you read the last item with regard to Frank Fiore?

A. Where is this? Yes.

Q. And that states what?

A. "Worked at the First Wrestling Camp in the State of Ohio and has worked at every Major Camp in the State of Ohio for the past several years."

Q. Do you agree or disagree with that statement?

A. I don't know if he worked at every major camp in Ohio.

Q. Is the Milkovich Camp a major camp in Ohio?

A. I wouldn't say it's a major camp. There were fellows that have had clinics before I had. Now, when you refer to a clinic or a camp, this is something where a coach brings in a speaker. It may be for two or three hours maybe in the afternoon. You may have an afternoon or evening session. Now, things of this nature have been going on in wrestling for many years.

Q. But apparently then, the Milkovich Wrestling Camp is not a major wrestling camp in the State of Ohio?

A. I don't know whether it's a major camp or not.

Q. Mr. Milkovich, directing your attention back to the wrestling match in question between Maple Heights and Mentor, I believe the diagram indicated two benches where the wrestling teams, the Maple and Mentor team, were side by side; correct?

A. Right.

Q. And a division between the two of them of maybe six to ten feet?

A. Yes. Maybe more or less. I don't know.

Q. In your experience as a wrestling coach, is that the usual placement of the benches for the wrestling teams?

A. No, they're usually separated, one on one side of the floor and the other on the other side But I have nothing to do with the seating of the benches. The Athletic Department does this.

Q. Let me ask you this final question of my cross examination at this time: Regarding the article in question, did you ever at any time contact the Willoughby News Herald and request a retraction of that article?

A. No, I don't think I did.

MR. HERZER: No further questions. Thank you.

* * * * *

Partial Transcript of Testimony of Dr. Harold Meyer
[Included in Joint Appendix at Request of Defendants]

CROSS EXAMINATION OF DR. HAROLD MEYER

BY MR. HERZER:

Q. Dr. Meyer, do you recall or have in mind a taped interview between you and Mr. Collins, from the Willoughby News-Herald, and Mr. Diadiun, from the Willoughby News-Herald?

A. A taped interview?

Q. A taped discussion, where the three of you were together and a discussion was taped. It would be on or about June 4th of 1975.

A. I don't recall. That could have been. June 4th?

Q. '75, yes.

A. What was the occasion?

Q. The occasion was a discussion between you, Mr. Collins, and Mr. Diadiun, where you discussed the hearing, discussed your feelings, and the determinations on the quotations in the newspaper, and so forth.

Either you do or you don't. Do you recall it?

A. No, I don't.

Q. Do you recall the deposition that was taken of you in Columbus on February 5, 1976?

A. Yeah. You were there.

Q. Are you acquainted with Mr. Collins, from the News-Herald?

A. Not by name.

Q. Could you point him out as he's sitting here?

A. Is this the gentlemen here?

Q. Which one are you referring to?

A. I know Ted, but I don't know the other gentlemen.

Q. You are not aware of Mr. Collins, then?

A. No.

Q. Would you point out Mr. Diadiun, then?

A. Yes. He's the man in the tan jacket.

Q. Now, Dr. Meyer, you previously testified that you are the Commissioner for the Ohio High School Athletic Association; is that correct?

A. Was.

Q. Excuse me. Was.

And you retired in what year?

A. September of '77.

Q. I'm going to hand you what has been labeled as Plaintiff's Exhibit C. Now, will you identify that letter for us?

A. It's a letter addressed to Michael Milkovich, Sr., Wrestling Coach of Maple Heights High School.

Q. Who wrote that letter?

A. I did.

Q. What was the date of that latter?

A. March 5, 1974.

Q. And what have you characterized that letter as being?

A. This was the letter that I was directed to send to Mr. Milkovich by the Board of Control, as a letter of censure.

Q. So that's a so-called letter of censure?

A. That's correct.

Q. Now, in this letter, isn't it true, Dr. Meyer, that you state, quote, "Coaches have a great responsibility in crowd control," unquote?

A. That is correct.

Q. Is is also stated that, quote, "It all begins with, first, of all, controlling yourself and members of your team. And if this is done in a proper manner, crowd control becomes a very minor problem," unquote?

A. That is correct.

(Defendants' Exhibit 1, 2, and 3, being letters, were marked for identification.)

Q. Dr. Meyer, I will hand you what is labeled as Defendants' Exhibit No. 1. Will you please review that and refresh your recollection?

Can you identify that letter?

A. This is the report from the principal of Mentor High School.

MR. OCCHIONERO: Objection, your Honor. May we approach the bench?

(The Court and counsel conferred at the bench, out of the hearing of the jury and this reporter.)

Q. Can you, Dr. Meyer, identify that letter for us, please?

A. This is a report from the principal of Mentor High School that was sent to our office.

Q. Right.

When you say "our office," will you please indicate?

A. Ohio High School Athletic Assocation.

Q. And the Ohio High School Athletic Association received that letter?

A. That is correct.

Q. Was it one of the letters that was before the hearing, before the Ohio High School Athletic Association?

A. This letter was copied and set to each member of the Board of Control.

Q. But was it before the Board at its hearing?

A. It was.

Q. I'll hand you what has been labeled as Defendants' Exhibit No. 2. Would you refresh your recollection on that, please, Dr. Meyer?

A. I'm familiar with this letter.

Q. Can you identify it, please?

A. This is a letter from Ben Klepek, who is the principal at Eastlake Junior High School, Willoughby.

Q. Was that letter received by the Ohio High School Athletic Association?

A. It was.

Q. Was is considered by the Ohio High School Athletic Association at its hearing?

A. This was a letter that was duplicated and set to our Board of Control members.

Q. And it was considered by the Ohio High School Athletic Association at the hearing?

A. That is correct.

Q. I'll hand you now what has been labeled Defendants' Exhibit 3, and allow you to refresh your recollection on that.

Can you identify the letter?

A. This is a letter written by Harry King, Central Wrestling Coach, Euclid, Ohio.

Q. Was this received by the Ohio High School Athletic Association?

A. It was received by the Ohio High School Athletic Association, and was duplicated and was sent to all members of the Board of Control.

Q. Was it considered by the Ohio High School Athletic Association at its hearing.

A. Yes.

Q. Thank you.

Dr. Meyer, at this time, I would like to hand you what has been labeled as Plaintiff's Exhibit E. Can you identify that publication for us, please?

A. This is the May, 1974 issue of the "Ohio High School Athlete," published by the Ohio High School Athletic Association.

Q. Is that the official publication of the Ohio High School Athletic Association?

A. It is.

Q. Can you indicate to me where that publication is sent by the Ohio High School Athletic Association?

A. To all member schools, to all registered officials, to all newspapers, to radio stations, television stations, and to subscribers.

Q. Is it fair to say, Dr. Meyer, that this is circulated throughout the State of Ohio.

A. Yes.

Q. And do you have any idea what the circulation was of that publication?

A. In May, it would probably be eight or nine thousand.

Q. Eight or nine thousand.

Now, I'd like to have you — excuse me. I'd like to direct your attention to Page 228 of the Plaintiff's Exhibit E, which is the May 1974 publication of the "Ohio High School Athlete," in particular, the reference to "Maple Heights Wrestling Team Placed on Probation."

MR. OCCHIONERO: Counsel, can I see a copy of that?

MR. HERZER: This is your exhibit?

MR. OCCHIONERO: It's labeled "Plaintiff's Exhibit," but I don't believe it's ours.

MR. HERZER: By stipulation.

MR. OCCHIONERO: It's a joint exhibit.

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The following proceedings were had at the bench, out of the hearing of the jury:

MR. OCCHIONERO: At this time, we would render a continuing objection to any reference and the admission into evidence of the magazine, with the exception of the Board of Control minutes, which are contained in the magazine, and the same for all the magazines.

Although it was stipulated prior to the trial, the stipulation, I believe, itself indicates with the exception of purposes of relevancy, are subject to the reservation of the right to object, for purposes of relevancy.

We would say, other than the Board of Control minutes, all other matters contained in the magazine are totally irrelevant to any issue presented at this trial.

We have no objection to the consenting of the Board minutes as being the best evidence of those Board minutes. Even with the stipulation, we reserve our right to object as to purposes of relevancy as to other matters in the magazine. This is true of all the other magazines which are subject to being admitted into evidence.

MR. HERZER: Your Honor, the reason we want to show the whole magazine is because, it we didn't, there may be a reason to object that it's only part of the document.

The point of it is, your Honor, among others, it's the official publication of the Board. It's the official way they circulate their minutes, and it shows the circulation throughout the state, which we feel is important.

THE COURT: You already established that.

MR. OCCHIONERO: The minutes, your Honor, we have no objection to those going in. We feel the rest of the magazine is irrelevant.

MR. SIMON: Totally irrelevant.

MR. OCCHIONERO: The stipulation did reserve our right to object for the grounds of relevancy.

Dr. Meyer is here. He can testify to the circulation, he can testify that this is the manner that the minutes are circulated.

And counsel is pointing to the various schedules of the wrestling matches. Much of this information is totally irrelevant to this hearing.

MR. HERZER: It's the entire publication, and the publication is the one that contains the minutes and is circulated thoughout the state.

I don't know how you would introduce the minutes, without any reference to the publication, without introducing the publication.

MR. OCCHIONERO: I think we could take the Board of Control minutes out of it. We stipulated those are the minutes circulated in the magazine.

THE COURT: I believe the number of tickets sold, and so on, are irrelevant to the issues in this case.

MR. HERZER: If you want to remove the Board minutes, I want to get the notion that this was published throughout the State of Ohio and distributed throughout the State of Ohio.

THE COURT: At the next recess, we'll remove the Board minutes and remark it.

MR. WICKENS: May I point this out before the Court makes a ruling?

These are all a little different. For instance, one of these also contains a captioned photograph of Mr. Milkovich and his team, on the front cover.

THE COURT: That becomes irrelevant.

MR. WICKENS: This is one here, he's sponsored by the Athletic Association to take part in this.

THE COURT: What does that tend to prove?

MR. WICKENS: That there was nothing personal in their decisions to censure.

THE COURT: I don't think that's relevant.

MR. OCCHIONERO: We have no objections to the minutes themselves.

MR. HERZER: As a matter of technique and procedure, I'm going to be asking Dr. Meyer to identify both the next two, F and G.

MR. OCCHIONERO: You can take the minutes and ask him to identify the minutes and how they are circulated.

MR. HERZER: I want to point this out to him. How is he going to know what it is?

THE COURT: Point what out?

MR. HERZER: I wanted to be able to show these minutes were contained in the "Ohio High School Athlete," which was distributed about the State.

THE COURT: At the recess, we'll remove the minutes and label those.

* * * * *

BY MR. HERZER:

Q. I'll direct your attention back again to Page 228 of the "Ohio High School Athlete," the reference to, "Maple Heights Wrestling Team Placed on Probation." Was the "Ohio High School Athlete," the publication, is that the official source for the Board minutes of the Ohio High School Athletic Association?

A. This is one way we publicize our minutes, but we have the official minute book in the office.

Q. Is that a true copy of the Board minutes regarding that hearing?

A. Supposedly.

Q. When you say "supposedly," what do you mean?

A. There could be a typographical error.

Q. Well, read through it, and see if there is a typographical error.

A. Sounds like it's correct.

Q. And this was the decision of the Board, to place Maple Heights on probation, and the censure of Milkovich, Sr. and Jr.; correct?

A. This is the February 28th meeting?

Q. The minutes of the February 28th meeting.

A. Right.

Q. From that meeting, your letter of censure was issued, is that correct?

A. That's right.

Q. Thank you.

I'll hand you now, Dr. Meyer, what has been labeled Plaintiff's Exhibit F, the "Ohio High School Athlete" for September of 1974. And I'll direct your attention to Page 26, the Board minutes from April the 25th, '74. And please review that with regard to Maple Heights.

Are these the official minutes of the Board meeting of April 25, 1974?

A. Right.

Q. Isn't it a fact, Dr. Meyer, that the Board minutes reflect, quote, "Maple Heights representatives request review of penalty imposed. Mr. H. Don Scott, Superintendent, acted as spokesman for the group. Mr. Scott apologized for the incident and failure to recognize the implications of the events preceding the eventual incident."

Is that a correct quotation from the minutes?

A. Sounds like it.

Q. So Dr. Scott actually apologized before the Board for the incident regarding the melee in the incident; is that correct?

A. That is correct.

Q. The minutes of April 25, 1974, also make reference to other action on behalf of the Board. This is on Page 27.

Will you refresh your recollection on that?

A. Right.

Q. And what was the action of the Board at that meeting?

A. In effect, their appeal was denied.

Q. Denied their appeal. Thank you.

I direct your attention, then, to the "Ohio High School Athlete," the publication of November, 1974, Page 71 and 72, particularly at the bottom of Page 71, carrying over to '72, with reference to Maple Heights. Would you look at that, please?

That is Exhibt G I handed to you. Can you explain what those minutes are and what the action is of the Board here?

A. Well, again, the minutes here aren't very explanatory.

Q. They are the official minutes of the Board, though, are they not?

A. Do you want me to —

Q. Yes, please.

A. At this time, there were attorneys present, and they again came down and made an appeal to change the decision of the Board. And after the Board listened to what they had to say, they decided to keep the decision as is.

Q. So there was the initial hearing before the Board, and then there were two appeals by Maple Heights; is that correct?

A. That is correct.

Q. In each of the appeal hearings, the Board sustained its prior ruling and the letter of censure that was sent out; is that correct?

A. That is correct.

Q. You say at the second of the two appeals — that would be the third hearing, administrative hearing — that counsel was present for Maple Heights; is that correct?

A. Right.

Q. And who were those counsel?

A. Let me see it.

Q. Isn't it a fact that the counsel was Mr. Simon, Mr. Occhionero?

A. Well, Carlisle Dollings was there.

Q. He was your counsel?

A. Right. Leonard Russo, President of the Maple Heights Board of Education; M. William Stark, Supervisor of the Maple Heights Building and Grounds; William Wallace, a lawyer representing Maple Heights: Mr. Crowley, a lawyer representing Maple Heights; Michael I. Occhionero and Nathan Simon, lawyers representing the Maple Heights parents.

Q. So Mr. Simon and Mr. Occhionero were there representing the Maple Heights parents?

A. Correct.

Q. In your testimony before Judge Martin, isn't it a fact you stated, "One of the big factors in the Board's decision was that Mike Milkovich, the head coach, refused to accept any resonsibility"?

A. I could have said that.

Q. You could have said that.

A. What did I say?

Q. Would you deny saying, "I said," quote, "Also, I think one of the big factors in the whole decision was the fact that Mr. Milkovich, the head coach, refused to accept any responsibility," unquote.

Would you deny that statement before Judge Martin?

A. Is that what is in the testimony there?

Q. Yes.

A. Then I said it.

Q. Well, then, would you agree with this statement: "But they," referring to Milkovich and Scott, "declined to walk into the hearing and face up to their responsibilities."

Would you agree to that statement?

MR. SIMON: Objection. I think it's a little bit confusing. Would he agree with what statement, the statement published in the article? Are you referring to that?

MR. OCCHIONERO: If he is referring to the testimony before Judge Martin, I think it's only fair that he see his testimony.

MR. HERZER: I read the testimony.

MR. OCCHIONERO: One portion of it.

THE WITNESS: Are you trying to check my memory? Is that what your trying to do?

MR. HERZER: No.

Q. I'm asking you, based on the statement before Judge Martin, whether you would agree with this statement. And I'll even put it in quotes.

"But they," referring to Milkovich and Scott, "declined to walk into the hearing," referring to the administrative hearing, "and face up to their responsibilities," unquote.

MR. OCCHIONERO: Objection, your Honor, as to what the witness would agree to, a statement which the attorney has made for him.

THE COURT: Sustained. If you want to ask him if he made that statement, ask him that.

MR. HERZER: He did not make that statement. I'm asking if he agrees.

MR. OCCHIONERO: Your Honor, we would strenuously object to that.

THE COURT: Sustained.

Q. You did made the statement, "Also, I think one of the big factors in the whole decision was the fact that Mr. Milkovich, the head coach, refused to accept any responsiblity."

You would agree that you made that statement?

A. You read it.

Q. Then did you say it?

A. Obviously I did.

Q. Dr. Meyer, isn't it a fact that you had three or four telephone conversations with Mr. Diadiun after the trial before Judge Martin and before the decision was rendered?

A. That could very well be.

Q. Isn't it a fact, Mr. Diadiun called you during the week of November 11, 1974, the week after the court trial?

A. There was a call made at that time, yeah, somewheres in there.

Q. About how long was this telephone conversation between you and Mr. Diadiun?

A. Oh, I would have no idea.

Q. Isn't it a fact, you testified at your deposition, it would be 10 to 15 minutes?

A. I could have.

Q. Would that have been the case?

A. If I — when was the deposition taken?

Q. Well, it was February 5th of 1976.

A. I'm sure my memory was better in '76 than it was in '78. If I said 10 or 15 minutes, then that was probably it.

Q. Didn't Mr. Diadiun call you again, then about two week later?

A. That, I don't remember.

Q. Do you deny that he called you two weeks later?

MR. OCCHIONERO: Objection.

A. I don't remember. I don't remember.

MR. HERZER: I'm not attempting to be argumentative. I'm trying to get an unequivocal answer.

MR. SIMON: The witness has answered the question, "I don't remember."

MR. HERZER: I'm now asking if he denied the call was ever made.

THE COURT: I think he has to lay the foundation.

Q. Do you deny the second call was made about two week later?

A. Sir, I can't say that I deny that, because I don't remember whether a call was made. How can I deny that?

Q. Okay. That's all I want, believe me.

MR. OCCHIONERO: Objection as to what counsel wants, and ask that is be stricken.

THE COURT: Sustained.

Q. I want your truthful answer.

MR. OCCHIONERO: Your Honor, I ask that that remark be stricken from the record.

THE COURT: Sustained.

Q. Wasn't there a third time, sometime in mid-December, that Mr. Diadiun called you, 1974, regarding the court trial?

A. In December, '74? Mr. Diadiun may keep records of his calls, but I never kept records of any independent calls, because I got calls at that time from all over the state.

Q. You did indicate, did you not, Dr. Meyer, that you were getting many, many calls throughout the state on this matter?

A. That is correct.

Q. Because it was a matter of statewide interest and concern; is that correct?

A. That is correct.

Q. So you don't recall whether Mr. Diadiun called you a third time in mid-December of 1974?

A. No.

Q. He could have, correct?

A. Could have, yes.

Q. Now, you testified that you were irked and upset and kind of angry, perhaps even frustrated, at the proceedings before Judge Martin; is that correct?

A. That is correct.

Q. Didn't the trial tend to develop on the basis of your negligence, rather than on the basis of who was hurt and who was at fault?

A. Well, that's — that's absolutely right. If you want to call it negligence, it was the procedure that should be followed under due process.

Q. Aren't those your words, your negligence?

A. I suppose. And I admit it was supposedly negligence, yes.

Q. Any you were angry and upset with regard to the course of the proceedings?

A. That is correct, before the decision was even rendered.

Q. Did you convey your sense of frustration and anger to Mr. Diadiun in your telephone conversation?

A. I could have, because I did to a number of people, I know that. In fact, anybody who talked to me about it, I told them how I felt.

Q. So Mr. Diadiun would have understood your sense of frustration?

MR. OCCHIONERO: Objection to what Mr. Diadiun would understand.

THE COURT: Sustained.

Q. You would have conveyed that to Mr. Diadiun; is that correct?

A. He could very well be one of them, yes.

Q. Now you maintain with regard to the due procees issues that were before the Judge, you maintained, did you not, at the trial, that you had given the Maple Heights people what you considered to be proper notice; is that correct?

A. Well, we sent a letter asking them to make — to come down to Columbus, bring anybody they wanted, and be prepared to give any information they felt like giving. And we felt that was adequate notice.

Q. And at any of the hearings?

A. Correct.

Q. At any of the hearings, prior to the court hearing, prior to the court proceeding?

A. Correct.

Q

The Maple Heights people had not normally objected to the notice at that time, had they?

A. No.

Q. With regard to this due process notice argument that was put before the Court, it was different, was it not, from what they had been arguing at the hearing?

MR. OCCHIONERO: Objection, your Honor, and I would like to approach the bench.

(The Court and counsel conferred at the bench, out of the hearing of the jury and this reporter.)

THE COURT: Ladies and gentlemen of the jury, I think we'll take our morning recess at this time, while the Court and counsel take up questions of law in chambers.

You are reminded of the admonition of the Court, not to discuss the case.

* * * * *

A brief recess was taken, after which the following proceedings were had in the presence of the jury:

THE COURT: Be seated.

CONTINUED CROSS EXAMINATION OF
DR. HAROLD MEYER

BY MR. HERZER:

Q. Dr. Meyer, before the recess, we were going to into the conversations that you had with Mr. Diadium, and various hearings, and the court trial, and so forth, and it has been some four years between the hearings — or, three years' time has passed. You did state that your recollection back a couple of years ago at your deposition was closer to the actual occurrence. I understand that matters have a tendency to fade, and I'm not trying to hold you to a definite statement.

MR. SIMON: Objection.

THE COURT: Sustained.

Q. Isn't it a fact that your recollection of the telephone conversation with Mr. Diadiun is quite hazy? You don't know how many conversations for sure you had?

A. That's correct.

Q. You don't know for sure what the substance of the telephone conversations were?

MR. OCCHIONERO: Objection.

THE COURT: Overruled. He may answer.

A. I do remember, because Ted, being at the match and at the hearing, he was really concerned about the Judge's decision. And I do remember that quality.

Q. And you have stated, have you not, on direct examination, that the matter of Mr. Milkovich's gestures, to your best recollection, did come up at the trial before Judge Martin, but not at the hearing before the Board; is that correct?

A. That's my recollection, yes.

Q. In the hearing before Judge Martin, you've also testified on direct examintion, that the primary emphasis while you were there was on due process; is that correct?

A. Right.

Q. Whereas, the primary emphasis before the Board hearings, or at the Board hearings, was on fault, who was at fault, who was guilty; is that correct?

A. That is correct.

Q. So that really, there were differences betwen the administrative hearings and the court trial; is that correct?

A. I would say that the point of emphasis were different.

Q. And that some of the testimony before the Board would have been pretty different from some of the testimony before the Court; is that correct?

A. That is correct.

Q. Recognizing the difference in the emphasis of the hearings with the court trial, it could well be that some of the stories that were — or, some of the testimony that was before Judge Martin would be unfamiliar, or you would not be familiar with that testimony with regard to what you heard before the Board; is that correct?

A. Well, I only heard really two witnesses before Judge Martin.

Q. And that was Mr. Milkovich; is that correct?

A. Mr. Milkovich, and I think one of the fathers of the youngsters involved.

Q. And as you mentioned, a good deal of Mr. Milkovich's testimony at the trial had to do with notices, and stuff of that nature, due process issue; is that correct?

A. Right. It really — it wasn't part of Mike's testimony. It was the two attorneys over there questioning me.

Q. Right.

So that there really was, as far as you are concerned, an unfamiliarity with some of the issues that were brought before Judge Martin; is that correct?

A. As far as —

MR. SIMON: Object.

THE COURT: He may answer. Overruled.

A. As far as the points of emphasis, yes.

Q. Now, Dr. Meyer, in your telephone conversations with Mr. Diadiun, do you recall whether you confined your comments solely to due process, or whether you may have discussed some of the substance too?

A. I can't be that accurate. The only thing I could possibly say here is, because of my feelings, my reaction after the trial in talking to anybody about it, I was thoroughly disturbed the way — the decision that was rendered was based not so much as who got hit or who did the hitting, but it was whether I had sent a notice to the school that there was going to be a hearing, and that they violated such and such a rule, that they could have an attorney, etcetera. This was the part that disturbed me, and this was the only way I talked about the case to anybody, because this wasn't a real concern.

Q. And the due process part was entirely different from what had been presented before the Board at the hearings?

A. We never even thought of due process. We felt that giving him three chances was due process.

Q. Dr. Meyer, in the course of the Board's and your investigation of the wrestling match, do you recall who suspended the wrestler that was caught fighting?

A. I remember th absolutely. I did.

Q. You did.

Did Maple Heights indicate at either the hearing before — or, the hearings before the Ohio High School Athletic Association or at the trial, that Maple Heights had suspended the wrestler, to your knowledge?

A. I don't recall.

MR. HERZER: I think I have no further questions. Thank you.

THE COURT: Redirect?

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Selected Trial Exhibits
(April, 1978)
[Included in Joint Appendix at Request of Defendants]

809

DEFENDANTS' EXHIBIT 11

Mike Milkovich
Wrestling School

ON THE CAMPUS OF
BALDWIN WALLACE COLLEGE
BEREA, OHIO

featuring the nation's
Outstanding Wrestling Family

Patrick Milkovich - 2 time NCAA Champion

Tom Milkovich - NCAA Champion

Mike Milkovich Jr. 2 time Mid American Champion

Mike Milkovich Sr. Coach of 450 Champions

CAMP DATES:

Session 1----------Sunday, July 11 to 16
Session 2----------Sunday, July 18 to 23
Session 3----------Sunday, July 25 to 30
Session 4----------Sunday, August 1 to 6
Session 5----------Sunday, August 8 to 13

"FEATURING THE
GREATEST MOVES
IN HIGH SCHOOL &
NCAA WRESTLING"

Clinic to be held on the campus of Baldwin Wallace College, Berea, Ohio. Registration will be held in the Baldwin Wallace Dining Hall on Sunday from 1:00 P.M. to 6:00 P.M. Three instruction periods will be held each day, Monday thru Friday. Parents should plan to pick up participants after 12:00 P.M. on Friday

Tuition Cost

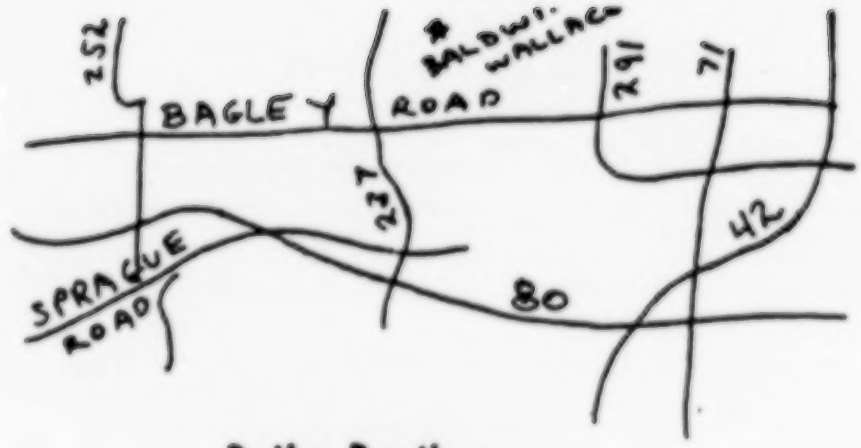
1. Tuition includes all wrestling instructions and full camp program.

2. Complete room and board. Total tuition is $95.00 for the week. A fee of $50.00 will be charged to all who are not registered for room and board. The first meal will be Sunday at 6:00 P.M. and the last meal is lunch on Friday. To enable the camp to make the necessary arrangements, all who enroll must make a deposit of $40.00 along with your application form. The balance of the tuition will be due and payable upon registration. We will use every precaution to prevent accidents.

IMPORTANT

In accordance with the National Collegiate Athletic Association and other athletic conference rules and regulations, a boy who has had enough preparatory education to be ACADEMICALLY ELIGIBLE to enter college in the fall of 1976 WILL NOT BE PERMITTED TO ATTEND the MIKE MILKOVICH WRESTLING CLINIC!

All persons enrolled for the wrestling clinic will be requested to attend ALL sessions and to comply with the rules and regulations of the Mike Milkovich Wrestling Camp governing conduct of ALL campers in camp. Any violation or abuse of these rules and regulations will cause immediate dismissal from the clinic without refund. Out of town participants will be picked from and returned to airport or Greyhound bus station.



Daily Routine

Breakfast----------7:30 - 8:30
Wrestling Instruction----------9:30 - 11:30

Lunch----------12:00 - 12:30
Wrestling Instruction----------2:30 - 4:30

Dinner----------5:00 - 5:30
Free Wrestling and Optional
Wrestling Instruction----------8:00 - 9:30

Subjects To Be Covered

Takedowns, escapes, pins, reversals.

Milkovich's Maple Heights style and philosophy behind wrestling!

Movies and training films!

Weight control (dieting)

Drilling!

Mat strategy!

811

APPLICATION BLANK

This blank should be sent to Mike Milkovich Wrestling School, 15600 Rockside Road, Maple Heights, Ohio 44137 WITH a deposit of $40.00. Make checks payable to: Mike Milkovich Wrestling Clinic. Upon receipt of application and deposit, you will receive an information bulletin with information on: travel, check-in, clothes, etc. Deposit is binding and will not be returned if cancellation occurs less than ten (10) days prior to opening day of session!

Applicants Signature _____ Applicants Age _____ Applicants Height _____

LAST FIRST INITIAL

Home Address _____ Parent's Signature _____

NUMBER STREET

City _____ State _____ Zip _____ School _____

Phone Number _____ INSURANCE NEEDED YES ___ NO ___

SESSIONS First Choice 1 2 3 4 5 Second Choice 1 2 3 4 5 Private Clinic Two

I desire to enroll in the 1975 Mike Milkovich Wrestling and Coaching Clinic to be held at Baldwin-Wallace, Berea, Ohio. The directors nor anyone connected with the clinic assumes any responsibility for accidents, medical, dental or any other expenses incurred as a result of accident. (ANY BOY NOT COVERED BY FAMILY INSURANCE CAN PURCHASE A POLICY FOR THE WEEK.) Please indicate if insurance is REQUIRED.

APPLICATION BLANK

PAT MILKOVICH

2 time NCAA Champion
2 time Big 10 Champion
NCAA All-Star Representative
Ohio State Champion
AAU Champion
3 time All-American
Captain at Michigan State
Outstanding Sophomore and Freshman Wrestler U.S.A.

TOM MILKOVICH

Three time All-American
4 time Big 10 Champion
U.S.A. representative to Russia
Captain at Michigan State
NCAA Champion
Assistant Wrestling Coach at Cleveland State University
Outstanding Wrestler in Big 10
3 time Ohio State Champion
Twice member Ford Cup All Star Team

MIKE MILKOVICH SR.

Ohio's No. 1 High School Coach
10 Ohio Team Championships
7 Runner-up Championships
Holds Hall of Fame Award
National Council of High School Coaches Award
Coached over 450 Champions

MIKE MILKOVICH JR.

Ohio State Champion
2 time mid-American Conference Champion
NCAAU Championship
All-American
Most dual meet victories without a defeat in Kent State's history... 30-0
Assistant Coach at Maple Heights High School

DEFENDANT'S EXHIBIT

S12

DEFENDANT'S EXHIBIT
NO. 12
4-13-78

MAPLE HEIGHTS SENIOR HIGH SCHOOL

5500 Clement Drive
Maple Heights, Ohio 44137

March 31, 1977

Coach Mike Milkovich has established himself with a sensational and almost unbelievable record in wrestling that can hardly be compared with any other coach in the country. In the history of wrestling in Ohio, he has had more individual and team championships than any other coach in the state.

All of Milkovich's coaching endeavors did not go unnoticed by the public. He has received numerous resolutions and merit awards from local, state governments, and coaches organizations:

National Helm's Hall of Fame Award
National Coach of the Year Award Presented by National High School Coaches Association
Newsboy Classic Award by the Pittsburg Press
Distinguished Coaching Service Award Presented by National Council for State High School Coaches
Ohio Coach of the Year Award
Greater Cleveland Conference Coaches Award
Ohio Wrestling Coaches Hall of Fame Award Charter Member
Kent State University Athletic Hall of Fame Award
Ohio Senate Resolution Citation
Ohio House of Representatives Resolution Citation
City of Cleveland Resolution Citation
City of Maple Heights Resolution Citation
Mike Milkovich "Day" proclaimed by the City of Maple Heights and the Mayor
Congressional Record Citation, Vol. 114, 6/4/68, No. 95, pp. E 4990; Vol. 118, 2/23/72, No. 25
Cuyahoga County Commissioners Plaque
Maple Heights Board of Education Resolution Citation
Ohio Senate Resolution Citation honoring entire family as champions
Italian-American Democratic Club Award
Kiawanis Club Award
Chamber of Commerce Club Award
Rotery Club Award
National Wrestling Federation Award (S.W.M.)
United States Wrestling Federation Award
National Achievement Award (for 100 victories) by Scholastic Wrestling News
Ohio High School Athletic Association Certificate of Appreciation
Mayor's Proclaimation

TEAM CHAMPIONSHIPS AND ACHIEVEMENTS

Coach Manager World Championship Wrestling Team	1st for U.S.A.
Ohio State Team Championships	10
Ohio State Team Runner-Up Championships	6
Ohio State District Championships	16
Ohio State District Runner-Up Championships	3
Ohio Sectional Championships	12
Ohio State Sectional Runner-Up Championships	3
Greater Cleveland Conference Championships	21
Sonhonore Tournament Championships	8
Brecksville Medina Tournament Championship	3

MAPLE HEIGHTS SENIOR HIGH SCHOOL —

5500 Clement Drive
Maple Heights, Ohio 44137

March 31, 1977

J.V. Tournament Championships	8
265 Victories 25 Defeats	
16 Undefeated Seasons	
132 Straight Ohio Victories	
59 Straight Ohio Victories	
Individual Championships	409
Individual Ohio Champions	37
Individual Ohio State Runner-Up Championships	23
Ohio State Place Winners	39
Individual Ohio State Regional and District Champions	72
Individual Ohio State Sectional Champions	87
Individual Greater Cleveland Conference Champions	134
Individual N.E.O.A.A.U. Champions	22
Individual Sophomore Tournament Champions	34
Individual All Scholastic Champions	24
Individual All American Champions	5
Individual World Champions J.W.H.C.	5
Individual 1st Place Winners in NCAA	3
Individual 1st Place Big 10 Champions	7

Other Contributions by Mike Milkovich:

President Greater Cleveland Conference Coaches & Officials Association
President of Ohio Coaches Association
Vice-President Ohio Coaches Association
Ohio State High School Representative
O.H.S.A.A. Advisory Board
Northeastern Ohio District Representative
National High School Problems Committee Representative
Instigated Innovations in Ohio High School Wrestling Programs
Junior High School Program
Junior Varsity Programs
Cheerleaders and cheers for Wrestling Teams
Wrestler's Dad's Club
Pay increase for Coaches and Officials, price adjustment for wrestling
Sponsored 10 buses to State Meet
Night Wrestling
Three Coaches to Coach Varsity and J.V. Teams
The Maple Heights High School Wrestling Program set an example for All Schools and Coaches to Follow in the Promotion for Wrestling
Advisor to Scholastic Wrestling News
Selected as Guest Speaker by Republic Steel Corporation Management
Guest Speaker at Clinics in Ohio, Pennsylvania, Michigan, New York, Indiana, S. Carolina, N. Carolina, Canada
National Jr. A.A.U. Champion
State High School Champion
Selection Committee for All American Awards for Ohio
Selected Coach of East West All Star Team in Ohio
Promotional Program for Wrestling, Published in Amateur Wrestling News
Selected Coach of Ohio State Champions vs. Pennsylvania State Champions

(DEFENDANTS' EXHIBIT 13 (Inside page)

Honored

GARFIELD HEIGHTS Knights of Columbus will honor Nick F. Vorona, Past Grand Knight, at a testimonial Dinner Dance Saturday at the Knights of Columbus Hall, 5000 Granger Rd. Vorona, 66, joined the Council in 1950 and has served on various committees and is also an officer on the Recorder, a K of C paper. Vorona lives at 4822 Elmwood Ave. with his wife, Florence. They have six children. For reservations to the dinner dance call Raymond C. Bruhl at 581-1977. Tickets will not be sold at the door.

HOME AGAIN

Navy Constructionman David L. Turgeon, husband of the former Alice B. Stine, 19630 Broadway, Maple Heights, returned to the United States after a five month stay in Antarctica. As a member of the Navy's Antarctic task force he helped provide support for scientific research programs being conducted by universities, government agencies and industrial firms.

ComCorp
The SOUTH EAST Su

Maple boosters supp

BY GAIL STUCKER

No one in Maple Heights, specially not the Booster Club is going to hold still for the Ohio High School Athletic Association ruling against Maple wrestlers and coaches. Almost 300 members, students and friends board club officials promise to overturn the reprimand through appeal.

School Board member Robert Carpenter added the district ESS already contacted their legal firm of Squire Sanders and Dempsey to appeal the case and prepare for court action if necessary.

Last Thursday the OHSAA ruled Maple responsible for an incident at the Maple-Mentor wrestling match which resulted in at least one Mentor wrestler needing hospital treatment of three or more stitches for a head wound.

The Mustangs are now ineligible to compete in the 1975 state tournament and are on probation until the end of the 1974 school year. Coaches Mike Milkovich Sr. and Milkovich Jr. were censured as "derelict in their responsibility to several members of their wrestling teams." Finally, principal William Cain was ordered to reevaluate the security measures for further matches.

Carpenter said of the three actions against the team by OHSAA "the one thing we will not tolerate is no state tournament in 1975." He said the team and fans could tolerate probation for two years.

The Booster Club wants a hearing before the OHSAA State Rep Robert Jankoski told the group that commissioner Harold Meyer will grant a second hearing on April 26 if Cain or Supt H. Dan Scott contacted the board in Columbus.

In anticipation of the hearing the boosters passed a resolution introduced by councilman and club member John Samail supporting the team now and in the future because "our young athletes over the years have shown outstanding athletic ability and sportsmanship in compiling an unprecedented record not only for our city, but also for the sport of wrestling. We would ask that the OHSAA reevaluate their decision in the best interest of athletics and the future of our area."

Members reviewed information and

Censured

At the center of the entire Maple Heights-Mentor pair fracas fracas is the fashion and non wrestling room of Mike Milkovich senior and junior. They were ordered censured by the state board of control last week, part of the

n
Thursday, March 7, 1974

ort appeal to OHSAA

Maple Heights High School boosters—about 300 of them—met Monday night at the school to discuss how to reverse the Ohio High School Athletic Association action against the Maple wrestling team. (See photo by Tom Mercer).

the appeal. Persons with any further information concerning actual events at the match were asked to send their information to the Maple Heights Booster Club in care of the high school.

Attorney Nate Simon, who described himself as an interested party and wrestling fan, said the hearing has to be quasi-legal. "As long as the commissioners know they can be reversed, they will negotiate," he added.

Simon said the decision violates personal, not civil rights of the boys. "To deprive the boys of the right to wrestle in the tournament is unfair, but not outside the law," he said.

The news media came under criticism for the coverage plus use of the name of the suspended Maple wrestler. One Maple supporter responded "We want our successes printed and our losses reported But we don't want our team exploited."

A spokesman for the Garfield Heights Booster Club promised a resolution from that club in support of the Milkoviches and the team will be ready for the appeal hearing.

Councilman Henry Kirl expressed concern that the commissioner could take away the 1974 state title if Maple should win it. Booster Club official Richard Prikryl said he doubted if that would be possible.

Former school board president Robert Werner said "It defies logic to punish one team for another," referring to the banning of next year's team from state competition. "I also think the team that becomes state champs in '75 will not want to get the championship without wrestling the best there are."

Werner called for unity between the board and the school administration when the appeal is presented. Board president Leonard Russo has stated Supt Scott "whitewashed" the incident by not taking action immediately. Scott said he did not have all the facts immediately, but the wrestler in question was suspended from the team right away.

The Boosters and Garfield representatives had highest praises for the coaches and backed their integrity and sportsmanship. Milkovich, who was not at the meeting, told Southeast Sun he is not pleased with the treatment of his team. "I think we have gave evidence. We were treated like dogs with no consideration at all," he told a reporter. "If anyone has done handle cloth, it is Maple Heights."

Milkovich concluded "I don't know what I am guilty of but if I am, I'll apologize."

Letter of Censure

[Included in Joint Appendix at Request of Defendants]

cc William Cain, Principal, Maple Heights
Mrs. Peg Hanrahan, Prin. Mentor
Ernest A. Zimmerman, Prin. Eastlake North

Mr. Michael Milkovich Sr.
Wrestling Coach
Maple Heights High School
5500 Clement Drive
Maple Heights, Ohio 44137

Dear Mr. Milkovich:

I have been instructed by the State Board of Control of the Ohio High School Athletic Assocation to write to you regarding the incident that happened at your wrestling match with Mentor High School.

From the reports studied by the State Board they were of the unanimous opinion that you were derelict in your responsibility to insure that members of your wrestling team conducted themselves the way high school athletes are expected to. There was a distinct feeling that if you had taken proper precautions your team would have not become involved with the Mentor High wrestlers.

Coaches have a great responsibility in crowd control and it all begins with, first of all, controlling yourself and members of your team and if this is done in a proper manner crowd control then becomes a very minor problem.

We sincerely hope that your fine record at Maple Heights, as a wrestling coach, will be further exemplified in your young athletes as good wrestlers and most importantly, good sports.

Sincerely yours,

Dr. Harold A Meyer
Commissioner

HAM:ha
March 5, 1974

Defendants' Motion for Summary Judgment
(April, 1981)
[Included in Joint Appendix at Request of Defendants]

COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR., *Plaintiff,*	)	CASE NO. 75 CIV 0301
	)	JUDGE JAMES
-vs-	)	JACKSON
	)	
THE NEWS-HERALD, *et al.* *Defendants.*	)	NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT
	)	

Pursuant to Rule 56(b) of the Ohio Rules of Civil Procedure and by leave of Court previously obtained, Defendants (The News-Herald, the Lorain Journal Co. and J. Theodore Diadiun, aka Ted Diadiun) hereby jointly and individually move this Court for:

(a) An Order granting Summary Judgment for Defendants and dismissing this action on the grounds that there is no genuine issue as to any material fact and that the subject Article constitutes a mere expression of the author's opinion, as a matter of law, and therefore cannot be libellous or defamatory under the First Amendment of the United States Constitution; or

(b) an Order granting Summary Judgment for Defendants that specific portions, words or phrases of the subject Article constitute mere expressions of the author's opinion, as a matter of law, and that such portions, words or phrases of the Article should not be presented to the Jury on the grounds that, with respect thereto, there is no genuine issue as to any material fact and that Defendants are entitled to judgment as a matter of law.

Because this Motion involves newly developed Constitutional law, Defendants request an oral hearing upon their Motion.

Respectfully submitted,

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David L. Herzer, Esq.

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Attorneys for Defendants

PROOF OF SERVICE

The undersigned hereby certifies that, on this 16th day of April, 1981, he mailed (by ordinary United States Mail, postage prepaid) a copy of the foregoing Motion and the following Brief to Plaintiff's Attorney, Nathan Simon, at 1328 Standard Building, Cleveland, OH, 44113.

David L. Herzer /s/
David L. Herzer, Esq., Attorney for Defendants

BRIEF

> "Under the First Amendment *there is no such thing as a false idea*. However pernicious an *opinion* may seem, we depend for its correctness not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) (Emphasis added).

1. Defendants filed their first Motion for Summary Judgment with this Court on Noember 5, 1976. In response thereto, the Court ruled that Plaintiff, Michael Milkovich, is a "public figure" in the Constitutional sense but, at that time, declined to grant judgment for Defendants as a matter of law.

Since the Court's rulings, however, a new body of law has more fully emerged to protect the press under the First Amendment. This new law was generated by the Supreme Court's statement (quoted above) in *Gertz*, *supra*, and holds that a newspaper's statement of *opinion* regarding a public figure cannot, by definition, be false and thus cannot be libellous or defamatory. *See Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir. 1977), *cert. denied*, 434 U.S. 834 (1977). Since this new aspect of Constitutional protection for newspaper opinion has never been presented to or argued before this Court, the purpose of this Brief is to summarize the new law in support of Defendant's second Motion for Summary Judgment.

2. Shortly after argument of Defendants' first Motion for Summary Judgment, courts increasingly began to recognize that a newspaper's expressions of opinion, ideas or severe criticism regarding public figures are Constitutionally privileged under the First Amendment and thereby cannot be defamatory. In 1977, the Second Circuit applied the *Gertz* opinion doctrine to an allegedly libellous newspaper article and held, as a matter of law, that "[a]n *assertion* that cannot be proved false cannot be held libellous". *Hotchner v. Castillo-Puche*, *supra*, at 913.

Our own Federal Sixth Circuit has recently confirmed the *Gertz* principle:

"It is now established *as a matter of Constitutional law* that a statement of *opinion* about matters which are publicly known is not defamatory." *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1114 (6th Cir. 1978), *cert. denied*, 99 S.Ct. 1502 (1979) (Emphasis added).

In 1979, Ohio's Fifth Appellate District accepted and applied the opinion doctrine regarding newspaper articles:

"Erroneous opinions are inevitably put forth in free debate, but even the erroneous opinion must be protected so that debate on public issues may remain robust and unfettered and concerned individuals may have the necessary freedom to speak their conscience...Consequently, *mere expressions of opinion or severe criticism are not libellous, even though it adversely reflects on the fitness of an individual.*" *Dupler v. Mansfield Journal Company*, 5 Media Law Rptr. 2269, 2274 (Tuscarawas Co. 1979) (Emphasis added).

These court-enunciated principles lead inexorably to a newly-recognized and powerful Constitutional syllogism: whereas a defamation is actionable only if it is false; and whereas a newspaper's opinions regarding public officials cannot, as a matter of Constitutional law, be false; therefore, a newspaper's opinions regarding public officials cannot be actionable even if defamatory. *See Mashburn v. Collin*, 355 So.2d 879, 884 (La. Supreme Ct. 1977); *Naked City, Inc. v. Chicago Sun-Times*, 5 Media Law Rptr. 1806, 1808, 395 N.E.2d 1042 (Ill. App. 1979); *Myers v. Boston Magazine Co., Inc.*, 6 Media Law Rptr. 1241, 1242, 403 N.E.2d 376 (Mass. Supreme Jud. Ct. 1980); *Anton v. St. Louis Suburban Newspapers*, 5 Media Law Rptr. 2601, 2604 (Mo. App. Ct. 1980); *Hoag v. Charlotte Republican-Tribune*, 5 Media Law Rptr. 1535, 1540-1541 (Mich. Cir. Ct. 1979).

3. Specifically, courts have held that the following expressions of opinion by newspapers are Constitutionally protected and not defamatory:

"Liar" "Deceptive Individual"	*Craig v. Moore*, 4 Med. Law Rptr. 1402 (Fla. Cir. Ct. 1978)
"Facist"	*Buckley v. Littell*, 539 F.2d 882 (2nd Cir. 1976)
"Manipulator" "Toady", "Hypocrite", "Exploiter"	*Hotchner v. Castillo-Puche*, 551 F.2d 910 (2nd Cir. 1977)
"Unfit to hold office" "Ineptness", "Incompetence"	*Palm Beach Newspapers v. Early* 334 So.2d 50, (Fla. Dist. Ct. App. 1976), *cert. denied*, 354 So.2d 351 (1976)
"Asshole"	*McGuire v. Jankiewicz*, 8 Ill. App.3d 319, 290 N.E.2d 675 (1972)

4. Particularly relevant to the instant matter, courts have uniformly held that the issue of whether an alleged defamatory publication constitutes opinion is a QUESTION OF LAW for the *court* to determine. *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1114, (6th Cir. 1978); *Sierra Breeze v. Superior Court of El Dorado Co.*, 86 Cal. App.3d 102, 106, 149 Cal. Rptr. 914, 917 (1978); *Church of Scientology v. Siegelman*, 475 F. Supp. 950 (S.D.N.Y. 1979); *Anton v. St. Louis Suburban Newspapers*, 5 Med. Law Rptr. 2601, 2605 (Mo. Ct. App. 1980).

The vast majority of courts have also concluded that, to avoid the proscribed "chilling effect" upon the press, a Motion for Summary Judgment is a proper vehicle to resolve the opinion issue *early* in the judicial proceedings. *Myers v. Boston Magazine*, 6 Med. Law Rptr. 1241 (Mass. Supreme Jud. Ct. 1980); *Craig v. Moore*, 4 Med. Law Rptr. 1402 (Fla. Cir. Ct. 1978); *Burns v. Denver Post*, 5 Med. Law Rptr. 1105 (Colo. Dist. Ct. 1979); *Stripling v. Literary Guild*, 5 Med. Law Rptr. 1958 (D.W.D. Texas 1979). In a carefully reasoned opinion, the Michigan Circuit Court recently summarized this majority view:

"According to the rationale of *Gertz* and *Orr* cases [cited herein *supra*], an 'opinion even if it is defamatory is protected. It cannot be used *as a* basis for a 'defamatory action'...Since it is an opinion constitutionally privileged,

it cannot be actionable. The plaintiff has failed to state a claim upon which relief can be granted. *The Motion for Summary Judgment*...must be granted for defendants." *Hoag v. Charlotte Republican-Tribune*, 5 Media Law Rptr. 1535, 1540-1541 (Michigan Cir. Ct. 1979) (Emphasis added).

5. In our case, the subject Article is a mere expression of the reporter's opinion regarding certain publically-known events commencing with the February 9, 1974 wrestling meet and culminating with the Franklin County Trial Court's decision on January 7, 1975. The Article is replete with the reporter's observations and interpretive conclusions regarding "lessons" to be learned, the reporter's perception and opinion of Milkovich's "ranting" and "egging the crowd on" at the fateful wrestling meet, the reporter's opinion as to the standard of conduct expected of educators, and the reporter's desire for such educators to "face up to their responsibilities".

Placed in the sports editorial column entitled "TD Says", the Article was clearly not intended to present factual news report of a *particular* sports event, such as a specific wrestling meet or baseball game. Rather, the Article represented the author's ideas, opinions and conclusion derived *collectively* from at least three distinct but related events which are plainly referenced in the Article: (1) the February 9, 1974 wrestling meet between Maple Heights High School and Mentor High School, and (2) the hearings on the wrestling meet conducted by the Ohio High School Athletic Association, and (3) the proceedings before and the decision of the Franklin County Common Pleas Court regarding the OHSAA administrative hearings and decisions. Thus, the Article did not focus upon and report the facts of any given event or happening but, instead, expressed a reporter's opinions derived from numerous separate, clearly-stated occurrences and happenings.

A close examination of the Article substantiates its opinionated nature and editorial purpose. First, as mentioned above, the Article appears in the sports editorial column labeled "TD Says". Next, the Article is given an editorial title: "Maple Beat the Law with the 'Big Lie'". This title clearly does not introduce a factual news report of any

particular event but rather previews the author's opinion which should be accorded the same Constitutional privilege granted to another reporter's use of the term "liar" in *Craig v. Moore*, *supra* at p. 1403, 1404. *See also Bennett v. Transamerica Press*, 298 F. Supp. 1013 (U.S.D.C. Iowa 1969) ("Liar"); *Wade v. Sterling Gazette Co*, 56 Ill App.2d 101 (3d Dis. 1965) ("Liar"). Moreover, it is the accepted rule that "...the headline must be considered together with the text of the article." *Naked City v. Chicago Sun-Times*, *supra*, at p. 1808.

As the Article progresses and based upon certain clearly stated facts, the author continues to develop and state his opinions and ideas:

> "But there is something much more important involved here than whether Maple was denied due process...When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator.
>
> "There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way — many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with observations of their superiors and peers, from watching actions and reactions.
>
> "Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last February 8.
>
> "A lesson which, sadly, in view of the events of the past year, is well they learned early.
>
> "It is simply this: if you get in a jam, lie your way out.
>
> "If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.
>
> * * * * *

"...Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with Greater Cleveland Conference rival Mentor...

* * * * *

"But they declined to walk into the hearing and face up to their responsibilities, as one *would hope* a coach of Milkovich's accomplishments and reputation would do, and one *would certainly expect* from a man with the responsible position of superintendent of schools." (Emphasis added).

Throughout the remainder of the body of the Article, the author clearly qualifies his statements as opinion through the use of such words as "probably", "apparently", and "seemed".

The Article then concludes with the following commentary:

"Anyone who attended the meet, whether he be from Maple Heights, Mentor or impartial observer, *knows in his heart* that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

"But they got away with it.

"*Is that the kind of lesson* we want our young people learning from their high school administrators and coaches?

"*I think* not." (Emphasis added).

6. Thus, under the newly-developed Constitutional privilege granted to articles of opinion, the subject Article cannot, by definition, be libellous. Defendants therefore ask that this Court issue its Order granting Summary Judgment in favor of Defendants and dismissing Plaintiff's action. Alternatively, Defendants request that this Court expressly ascertain, adjudge and declare the specific portions, words and phrases of the Article which, as a matter of law, are expressions of opinion and which thereby cannot constitute actionable defamation and grant Defendants' Motion for Summary Judgment as to such portions of the Article.

Respectfully submitted,

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Attorneys for Defendants

NOTICE OF ORAL HEARING

Please be advised that the Court has set the 5th day of May, at 3 o'clock p.m., as a hearing time for said Motion.

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David L. Herzer, Esq., Attorney
for Defendants

PROOF OF SERVICE

This is to certify that a copy of the foregoing Motion of Defendants For Summary Judgment, Instanter has been sent by ordinary United States mail, postage prepaid, on this 16 day of January, 1987, to:

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Richard D. Panza /s/
Richard D. Panza

Defendants' Supplemental Brief in Support of Summary Judgment

[Included in Joint Appendix at Request of Defendants]

COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR., *Plaintiff,*	)	CASE NO. 75-CIV-0301
	)	JUDGE JAMES JACKSON
-vs-	)	
THE NEWS HERALD, *et al.* *Defendants.*	)	SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

BRIEF

1. On May 26, 1981, this Court held an oral hearing upon Defendants' Motion for Summary Judgment. Written Briefs had been previously submitted by Defendants and Plaintiff. The basis for the Motion for Summary Judgment and the issue before the Court was whether the subject Article (published January 8, 1975) constituted "opinion" privileged and protected under the First Amendment. Because the "opinion" issue has only recently emerged from a new body of case-law, neither this Court nor the Appellate Court previously faced the issue. In fact, the Appellate Court ruled that, in an action for libel, a newspaper article's challenge to prior testimony before a court constitutes "malice" in the Constitutional sense. The issue of "opinion", however, arises *prior to* any determination of "malice" or libel, since opinion cannot, by definition, be libelous.

2. At the oral hearing, Plaintiff argued against Defendants' Motion for Summary Judgment primarily on the basis that the Article did not set forth the facts supporting the opinions stated therein; Defendants countered that the Article clearly stated the facts upon which the opinions were based. After the oral argument, yet another recent case has been published regarding opinion and this new case focuses squarely upon the issue of revealing facts in the article. *Pease v. Telegraph Publishing*, 7 Media Law Reptr. 2224 (New Hampshire Supreme Court, February 23, 1981). Since this case concerns an article which is substantially similar to the instant article, a copy of the

Supreme Court's opinion is attached to this Brief for the Court's examination.

3. In *Pease*, the New Hampshire Supreme Court held that the article therein fully disclosed the factual basis upon which the opinion was formed. The article read, in relevant part, as follows:

> "To the Editor: *While a student* at the University of New Hampshire several years ago, *I had the opportunity to witness* what in my mind was the worst single example of a *journalistic smear*. That situation involved the appointment of Thomas Bonner as president of the university. The smear was conducted by R. Warren Pease of the Manchester Union Leader."
>
> "While I certainly would not equate the significance of Pease's irresponsible journalism with the single opinion column of Merrill Lockhard's on Wednesday, November 2, *I do feel* he *apparently* is trying to deprive Mr. Pease of his own title as *journalistic scum of the earth*." 7 Media Law Reptr., at p. 1115. (Emphasis supplied).

The Supreme Court held that the above article did disclose the factual basis upon which the opinion was based by stating that the author had observed the plaintiff's coverage of the appointment of Thomas Bonner while a student at the University of New Hampshire. 7 Media Law Reptr., at pp. 1116, 1117. Similarly, in our case, Reporter Diadiun clearly set forth in the Article that his opinions were based, *inter alia*, upon his *observations* at the fateful wrestling match and at the hearing before the Ohio High School Athletic Association.

The New Hampshire Court also emphasized that the articles referred to in the alleged libelous publication were "in the public domain, and anybody with sufficient interest could have reviewed it in order to determine whether they agreed with [the] opinion..." 7 Media Law Reptr., at p. 1117. In our case, the opinion that Milkovich lied during this testimony before the Franklin County Common Pleas Court was also based upon facts "in the public domain" and any reader of the Article with sufficient interest could have reviewd Milkovich's sworn testimony before the Franklin County Common

Pleas Court to determine if the reader agreed or disagreed with Reporter Diadiun's opinion. Because of its significance and relevance to our case, the New Hampshire Court's discussion of the article is reproduced *verbatim*:

> "The letter to the editor fully disclosed the factual basis upon which Grandmaison formed his own opinion. The letter stated that while a student at the Unversity of New Hampshire, Grandmaison had *observed* the plaintiff's coverage of the appointment of Thomas Bonner as head of that institution. These facts were shown to be true. *The series of articles by the plaintiff was in the public domain*, and anybody with sufficient interest could have reviewed it in order to determine whether they agreed with Grandmaison's opinion that the series constituted a smear campaign. *See Myers v. Boston Magazine Co., Inc.*, 403 N.E.2d at 379. Thus, the "facts" upon which Grandmaison formed his opinion were disclosed and the opinion does not imply other facts." 7 Media Law Reptr., at pp. 1116 and 1117 (Emphasis added).

Additionally, on holding that the objectionable language in the article was "opinion", the New Hampshire Court further emphasized that the author used such phrases as "I do feel". 7 Media Law Reptr., at p. 116. In our case, Reporter Diadiun continually qualifies his statements as opinion through the use of such words as "probably", "apparently", and "seemed."

4. In sum, the *Pease* case continues the everincreasing line of cases protecting under the First Amendment opinion regarding public figures. Our case is substantially similar to the *Pease* case both factually and legally. To an even greater extent than in *Pease*, Reporter Diadiun clearly stated all the factual bases upon which his opinions were formed for any reader who wished to verify Diadiun's opinions. Therefore, the Article is Constitutionally protected "opinion" which cannot be libelous under the *Pease* rationale.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that, on this 14th day of July, 1981, he mailed (by ordinary United States mail, postage prepaid) a copy of the foregoing Supplemental Brief to Plaintiff's attorney, Nathan Simon, at 1328 Standard Building, Cleveland, OH, 44113.

David L. Herzer /s/

David L. Herzer, Esq.
Attorney for Defendants

Defendants' Motion for Summary Judgment and Memoranda in Support Thereof and Plaintiff's Response in Opposition Thereto
(1989)
[Included in Joint Appendix at Request of Defendants]

COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR., *Plaintiff.*	)	CASE NO. 75-CIV-0301
	)	JUDGE
-vs-	)	**MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT, INSTANTER**
THE NEWS HERALD, *et al.* *Defendants.*	)	

NOW COME Defendants, and move this Court for the following orders in this cause:

1. An order, pursuant to Rule 56(D) of the Ohio Rules of Civil Procedure, finding that Plaintiff, Michael Milkovich Sr., is a public official within the meaning of the decisions of the United States Supreme Court in the cases of *New York Times Company v. Sullivan*, 376 U.S. 254 (1964), and *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

2. An order, pursuant to Rule 56(D) of the Ohio Rules of Civil Procedure and pursuant to the decisions of the United States Supreme Court in the cases of *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323 (1974), and *Anderson v. Liberty Lobby*, ___ U.S.___, 106 S.Ct. 2501 (1986), finding that with all the evidence reasonably construed most favorably for the Plaintiff, Michael Milkovich, Sr., reasonable minds cannot find by clear and convincing evidence that there is a genuine issue of material fact that the subject article complained of in Plaintiff's Complaint published by Defendant, The News-Herald, was published with knowledge of falsity or with reckless disregard of the truth.

3. An order barring Plaintiff's recovery on the article published by the defendant, The News-Herald, claimed as false and defamatory in Plaintiff's Complaint, on the grounds that the publication of said article constitutes constitutionally protected opinion pursuant to the decisions of the United States Supreme Court in the cases of *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323 (1974), and *Bose Corp. v. Consumers' Union of U.S., Inc.*,_____ U.S. _____, 104 S.Ct. 1872 (1984), and pursuant to the decision of the Ohio Supreme Court in the case of *Scott v. The News-Herald*, 25 Ohio St. 3d 243 (1986).

This motion is based upon the interrogatories and depositions filed with this Court in this case; all of the affidavits and exhibits annexed to Defendants' prior Motions for Summary Judgment filed with this Court on November 8, 1976 and April 17, 1981; and the affidavit annexed hereto and made a part of this motion.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that a copy of the foregoing Motion of Defendants For Summary Judgment, Instanter has been sent by ordinary United States mail, postage prepaid, on this 16 day of January, 1987, to:

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Richard D. Panza /s
Richard D. Panza

Defendants' Memorandum in Support of Summary Judgment

[Included in Joint Appendix at Request of Defendants]

COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR., *Plaintiff,*	)	CASE NO. 75-CIV-0301
	)	JUDGE JACKSON
-vs-	)	**MEMORANDUM OF DEFENDANTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
THE NEWS HERALD, *et al.* *Defendants.*	)	

I. FACTS

Plaintiff, Michael Milkovich, Sr., is the former head wrestling coach of Maple Heights High School in Cuyahoga County. On February 9, 1974, Plaintiff's wrestling team had a meet with Mentor High School. A fight broke out involving spectators and team members from both squads after a Maple Heights wrestler was disqualified by the referee.

As a result of the altercation, the Ohio High School Athletic Association ("OHSAA") held hearings and issued sanctions against the Maple Heights team, including disqualification from the state tournament, a one-year probationary status, and a censure of Plaintiff, Michael Milkovich, Sr., for his actions during the match.

Thereafter, several parents and affected wrestlers sued OHSAA in the Court of Common Pleas in Franklin County for a restraining order, contending that they were denied due process. The Plaintiff, Michael Milkovich, Sr., testified at this proceeding, as did Dr. Harold A. Meyer, the Commissioner of OHSAA. The court reversed the probation and ineligibility orders on grounds of denial of due process.

On the day following the court's order, January 8, 1975, Defendant, the News-Herald, published a column written by Defendant, J. Theodore Diadiun, on its sports page. The column was entitled "Maple Beat The Law With the 'Big Lie,' " and included the words "T.D. says" beneath the title. The carry-over page was entitled "...Dia-

diun Says Maple Told a Lie." The article alleged, among other things, that the Plaintiff, Michael Milkovich, Sr., and H. Don Scott, the former superintendent of the Maple Heights School District, misrepresented the events which led to the OHSAA sanctions in an attempt to shift the blame to the Mentor team. Defendant Diadiun stated in the article that he had attended the match and the OHSAA hearing, and had discussed the court proceeding with Dr. Meyer. The article stated, near the end:

> Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

On April 30, 1975 Michael Milkovich, Sr., and H. Don Scott each filed a suit in libel in the Lake County Common Pleas Court against The News-Herald, as a newspaper with principal offices in Willoughby, Ohio, and The Lorain Journal Co., as owner and publisher of The News-Herald. The Complaint in this case alleged that the article written by Defendant Diadiun on January 8, 1975 (hereinafter called the "Article"), and published by the Defendant News-Herald on January 8, 1975, libeled the Plaintiff, Michael Milkovich, Sr. The case was initially assigned to the Honorable John F. Claire, Jr.

After proper answers and pretrial discovery proceedings, Defendants filed an initial Motion for Summary Judgment. On May 23, 1977, the Trial Court granted Defendants' motion in part and held that Plaintiff Milkovich was a "public figure" within the meaning of *Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967).

The action proceeded to trial by jury. After five days of trial and at the close of the Plaintiff's evidence, the Court granted Defendants' motion for a directed verdict.

Plaintiff Michael Milkovich, Sr. appealed the Trial Court's directed verdict to the Court of Appeals, Eleventh District, Lake County. In an opinion dated December 3, 1979, the Lake County Court of Appeals reversed the Trial Court's directed verdict and remanded the case for "further proceedings." *Milkovich v. Lorain Journal Co.*, 65 Ohio App. 2d 143 (1979).

On December 27, 1979, Defendants appealed the Lake County Court of Appeals' decision to the Ohio Supreme Court. On March 20, 1980, the Ohio Supreme Court dismissed Defendants' appeal on the basis that no substantial constitutional question was presented. Defendants' motion for rehearing with the Ohio Supreme Court was similarly denied on April 25, 1980.

Defendants then petitioned the Supreme Court of the United States for a writ of certiorari on July 23, 1980. *Lorain Journal Co. v. Milkovich*, 449 U.S. 996, 66 L. Ed. 2nd 232 (1980). Without a written opinion, the Supreme Court denied Defendants' petition. Justice Brennan, however, wrote a dissenting opinion strongly criticizing the Lake County Court of Appeals for its December 3, 1979 decision. Justice Brennan found as follows:

> This holding is clearly contrary to the First Amendment and to relevant precedents of this Court. I had supposed it was settled that newspapers are privileged to publish their views of the facts, so long as those views are not reckless or knowingly false. It matters not that such views may conflict with those of a court, for the press is free to differ with judicial determinations. In the libel area, neither a court nor any other institution is the "recognized arbiter of the truth," as the court below asserted.

Lorain Journal Co. v. Milkovich, 449 U.S. 966, 969, 66 L.Ed.2d 232, 234 (1980).

Thereafter, this case was remanded to the Trial Court for "further proceedings" as required by the prior mandate of the Lake County Court of Appeals. On April 17, 1981, Defendants filed their second motion for summary judgment with the Trial Court. After submission of briefs, oral argument and a review of the evidence, the Trial Court granted Defendants' motion on September 4, 1981, and dismissed Plaintiff's Complaint. The Trial Court's decision was based upon the fact that the Plaintiff had not sustained his burden of proof to establish actual malice and that the article in question was constitutionally protected opinion.

On October 26, 1981, Plaintiff appealed the Trial Court's decision to the Court of Appeals, Eleventh District, Lake County. In an opinion dated October 3, 1983, the appellate court upheld the Trial Court's issuance of summary judgment.

On November 30, 1983, Plaintiff appealled to the Ohio Supreme Court. On December 31, 1984, the Ohio Supreme Court reversed the decision of the Lake County Court of Appeals, holding, *inter alia*, that the Plaintiff, Michael Milkovich, Sr., was not a public figure and further holding that the article in question was *not* constitutionally protected opinion. *Milkovich v. The News-Herald*, 15 Ohio St. 3d 292, 297-299 (1984).

While this case was winding its way up and down the appellate ladder, its companion case, *H. Don Scott v. The News-Herald* (Case No. 75 CIV 0340), was dismissed by this Court on summary judgment on or around April 27, 1982. The grounds for the summary judgment granted to Defendants in the *Scott* case were identical to those used by this Court in granting summary judgment in the instant case on September 4, 1981, that being that Plaintiff had failed to establish actual malice and that the article in question was constitutionally protected opinion.

The *Scott* decision was appealed to the Court of Appeals, Eleventh district, Lake County. On December 30, 1983, the Lake County Court of Appeals affirmed the summary judgment granted by the Trial Court in the *Scott* case. On January 26, 1984 the decision of the Lake County Court of Appeals in *Scott* was then appealed to the Ohio Supreme Court. On August 6, 1986, the Ohio Supreme Court affirmed the decision of the Lake County Court of Appeals and thereby approved the Trial Court's grant of summary judgment in the *Scott* case. In its opinion, the Supreme Court made two findings which affect the Defendants in this case. First, the court overruled its earlier holding in the instant case, *Milkovich v. The News-Herald*, 15 Ohio St. 3d 292 (1984), in regard to what the court termed "its restrictive view of public officials." *Scott*, 25 Ohio St. 3d at 248. Overruling its earlier decision in *Milkovich* in yet another respect, that court further ruled that, based upon the totality of the circumstances, Defendant Diadiun's article, which is the subject of the instant case, is

privileged opinion protected under both the United States Constitution and the Ohio Constitution. *Scott*, 25 Ohio St. 3d at 254. In November, 1986 appellants appealed the decision of the Ohio Supreme Court to the United States Supreme Court. On December 8, 1986, the United States Supreme Court dismissed the *Scott* case, and so it stands as the law of Ohio.

II. AT THE TIME OF PUBLICATION ON JANUARY 8, 1975, PLAINTIFF MICHAEL MILKOVICH, SR., AS A PUBLIC SCHOOL TEACHER AND COACH IN THE MAPLE HEIGHTS PUBLIC SCHOOL SYSTEM, WAS A PUBLIC OFFICIAL FOR THE PURPOSES OF THE INSTANT PROCEEDING.

Plaintiff Milkovich, at the time of the publication of the article complained of, January 8, 1975, had been a faculty member in the Maple Heights public school system for 26 years. His annual salary at the time of publication was Seventeen Thousand Four Hundred Dollars ($17,400.00). (Milkovich Deposition at 5-6.) He also was a well-known wrestling coach in the Maple Heights' High School athletic department. Lastly, on January 8, 1975, he was a teacher of driver training at the Maple Heights High School. (Milkovich Deposition at 73-74.) As a result of this status as a public school teacher and coach, Plaintiff, Michael Milkovich, Sr., was a public official for the purposes of libel with respect to the publication of the article in question.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964), the Supreme Court of the United States held that in a libel action:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Whether the Plaintiff, Michael Molkovich, Sr., is a public official involves a question of law for the trial court to determine. *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966).

In determining whether an individual is a public official, the court is guided by the United States Supreme Court's statement in *Rosenblatt v. Baer*, 383 U.S. at 86:

> ...Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in *New York Times* are present and the *New York Times*'s malice standards apply.

This standard was recently reaffirmed by the Ohio Supreme Court in *Scott v. The News-Herald*, 25 Ohio St. 3d 243, 245 (1986). As the Ohio Supreme Court set forth in *Scott*, it is necessary, in order to promote uninhibited debate, to elevate or heighten the standard of proof in libel actions involving those who exercise a substantive role in shaping a community. *Id.* at 246. After reaching this conclusion, the court in *Scott* applied this standard to Scott as superintendent of the Maple Heights Public School System. The key issue examined by the court, which coincidentally applies to the instant case, was an analysis of the public official status of *public school teachers*.

In analyzing a public school teacher's role in a local community, the court in *Scott* reiterated the opinions of Justice Brennan and Justice Marshall, dissenting from the United States Supreme Court denial of certiorari in the instant case, *Lorain Journal Co. v. Milkovich*, 449 U.S. 966, 88 L.Ed.2d 305 (1985) that public school teachers are public officals.

> Public school teachers may be regarded as performing a task that goes to the heart of representative government. *Ambach v. Norwick*, 441 U.S. 68, 75-76 (1975) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973). *Id.* at 309. Justice Brennan reiterated the belief at the core of today's decision that the public school teacher exerts a substantial role in shaping a community through his or her impact on the students both as a role model and educator. *See also San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 29-30 (1973); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

Scott, 25 Ohio St. 3d at 247 (internal quotation marks omitted).

The court in *Scott* further reasoned that an analysis of where the publication appeared was important in determining whether an individual is a public official. The court found in the *Scott* case that where, as in the case at bar, the publication of the alleged defamation is in a newspaper with a local circulation, that fact strengthens a finding that a public school teacher is a public official. The court in *Scott* held that controversial actions of a public school superintendent constitute major news in a local paper. *Scott*, 25 Ohio St. 3d at 246.

From an analysis of the effect that public school teachers have on the community in general, and due to the fact that the actions of such individuals constitute major news in the local community, the *Scott* court concluded that the plaintiff therein, as a public school superintendent, was a public official. Furthermore, the court specifically overruled its earlier holding in this case, *Milkovich v. The News-Herald*, 15 Ohio St. 3d 292 (1984), in regard to what the court termed "its restrictive view of public officials." *Scott*, 25 Ohio St. 3d at 248. Thus, the Ohio Supreme Court reversed its previous holding in the instant case, and ruled that coach Milkovich is a public official for purposes of the instant action.

Therefore, it must be concluded that Michael Milkovich, Sr., as a public school teacher and as an athletic coach within the athletic department of a public school, exercised substantial control in shaping the community. His impact on students, both as role model and educator, was significant. As this Court can easily determine, the activity upon which the subject article was written was activity Plaintiff conducted as the wrestling coach for the public school system. To say that his actions did not influence both the members of the Maple Heights wrestling team and those students whom he taught, whether present at the wrestling meet or not, is to ignore the obvious. The extent of the Plaintiff's influence as a teacher and wrestling coach is best exemplified by the fact that within the Maple Heights school system there is currently a school which bears the name of the

Plaintiff. *See* Affidavit of T. Diadiun. This fact demonstrates that Michael Milkovich, Sr., as public school teacher and wrestling coach within the public school system, performed activities within the community which were major news. Therefore, his actions and activities both at the wrestling melee which took place in February, 1974 and in the testimony given by him both at the OHSAA hearing and before the Franklin County Court of Common Pleas on January 7, 1975 were matters of great public interest.

Thus, it must be concluded that Plaintiff, Michael Milkovich, Sr., was a "public official" under the reasoning of *Rosenblatt* and *Scott*, by virtue of the substantial responsibility, supervisory authority and impact on the community possessed by him as both a teacher and coach in the athletic department of the Maple Heights High School, and by virtue of the public's legitimate interest in his conduct as such. *See also Bararich v. Rodeghero*, 321 N.E.2d 739, 742 (Ill. Ct. App. 1974); *Kapiloff v. Dunn*, 343 A.2d 251, 258 (Md. Ct. App. 1975); *Schalze v. Coykendall*, 545 P.2d 392, 398 (Kan. 1976); *Press Inc. v. Verran*, 569 S.W.2d 435, 441 (Tenn. 1978).

In the instant case, a review of the article sued upon establishes that it deals exclusively with actions performed by Plaintiff while a coach in the athletic department of the Maple Heights High School system. Therefore, the subject article relates to Plaintiff's actions as a public official and Defendants are thus deserving of all attendant constitutional protections associated with reporting on the activities of such an official. *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971); *Rosenblatt v. Baer*, 383 U.S. 75, 87 n. 14 (1966); *Scott v. The News-Herald*, 25 Ohio St. 3d 243, 247 (1986).

III. CONSTRUING ALL OF THE EVIDENCE MOST FAVORABLY FOR THE PLAINTIFF, REASONABLE MINDS CAN CONCLUDE ONLY THAT THE ARTICLE IN QUESTION WAS NOT PUBLISHED WITH ACTUAL MALICE.

The burden upon the Plaintiff as a non-moving party on a motion for summary judgment in a case alleging defamation where the Plaintiff is a public official pursuant to *Rosenblatt v. Baer*, 383 U.S. 75

(1966), and the manner in which the trial court should review such a motion, have recently been clarified by the United States Supreme Court in *Anderson v. Liberty Lobby*, ___ U.S. ___, 106 S.Ct. 2501 (1986).

In *Anderson*, the court found by a six to three majority that a trial court ruling on a motion for summary judgment must be guided by the clear and convincing evidentiary standard in determining whether a genuine issue of actual malice exists. That is, the court concluded, whether the evidence is such that a reasonable jury might find that actual malice had been shown with convincing clarity. The plaintiff may not defeat defendant's properly supported motion for summary judgment in a libel case without offering concrete evidence from which a reasonable jury could return a verdict in his favor, or by merely asserting that the jury might disbelieve the defendant's denial of actual malice. *Id.* at 2. In each case, the judge must ask whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence is insufficient; there must be clear and convincing evidence on which the jury could reasonably find for the plaintiff.

In passing upon the evidence on a matter for summary judgment, the trial judge must determine whether there is justifiable inference of fact upon whch a reasonable mind might fairly conclude for the plaintiff beyond a clear and convincing standard. *Anderson, Id.* at 3 and 7. Put another way, where the factual dispute concerns actual malice, clearly a material issue in this case, the appropriate summary judgment question will be whether the evidence in the record could support a reaonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence, or that the plaitiff has not. *Anderson, Id.* at 8.

The decision in *Anderson* concerned Rule 56 of the Federal Rules of Civil Procedure. In reference to the appropriate standard to be applied in libel cases under the corresponding Ohio rule, the Ohio Supreme Court in *Dupler v. Mansfield Journal Company, Inc.*, 64 Ohio St. 2d 116, 120 n. 3 (1980), stated that:

> The Ohio summary judgment rule is patterned after Federal R. Civ. P. 56; and it is clear that, especially in the area of First Amendment rights, Ohio courts will following the same approach as taken by federal courts in deciding summary judgment motions.

Therefore, it is encumbent upon this Court to review the evidence before it to determine whether, when the evidence is construed most favorably for the Plaintiff, the Plaintiff has offered clear and convincing evidence of actual malice which could support a reasonable jury finding.

The question of the existence of actual malice, that being defined as knowledge of falsehood or reckless disregard of the truth pursuant to *New York Times v. Sullivan*, 376 U.S. 254, 279-280 (1964), has already been decided by this Court, specifically on September 28, 1981. Based upon the depositions, answers to itnerrogatories and affidavits it had before it in Defendants' Second Motion for Summary Judgment, this Court found that "Plaintiff's documentary evidence fails to substantiate the existence of actual malice by clear and convincing proof." (Trial Court Opinion dated September 4, 1981, at 11.) To reiterate all of the arguments recited by the Court in that opinion would serve no purpose; rather, a copy of the Court's Opinion is marked Exhibit B, attached hereto and made a part of this Motion for Summary Judgment. The fact that the Court in September, 1981 was applying the actual malice standard to the Plaintiff as a "public figure" rather than a "public official" is irrelevant, since the application of the "actual malice" standard applies in both instances and the evidenciary burden in each case is identical. *New York Times v. Sullivan*, 376, U.S. 254 (1964); *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

In sum, the Plaintiff, as has already been concluded by this Court, cannot establish by clear and convincing evidence that Defendants on January 8, 1975 published the subject article with "actual malice." Therefore, Defendants are entitled to summary judgment.

IV. THE ARTICLE WHICH IS THE BASIS OF PLAINTIFF'S COMPLAINT PUBLISHED BY THE DEFENDANTS ON JANUARY 8, 1975, IS PRIVILEGED OPINION PURSUANT TO THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, §11, OF THE OHIO CONSTITUTION.

This Court, on September 4, 1981, found that the article published by the Defendants on January 8, 1975 was constitutionally protected opinion. *See* Opinion dated September 4, 1981, at 8. Thereafter, this Court's judgment was affirmed by the Lake County Court of Appeals but reversed by the Ohio Supreme Court on December 31, 1984. However, on August 6, 1986, the Ohio Supreme Court specifically overruled its previous holding in *Milkovich v. The News-Herald*, 15 Ohio St. 3d 292 (1984), and held in *Scott v. The News-Herald*, 25 Ohio St. 2d 243, 254 (1986), as follows:

> Based upon the totality of circumstances it is our view that Diadiun's article was constitutionally protected opinion both with respect to the Federal Constitution and under our State Constitution...

The rationale of the court for overruling its prior decision was that the totality of the circumstances must be examined in order to determine whether a published statement is constitutinally protected opinion. *Scott*, 25 Ohio St 3d at 243. The court in *Scott* dissected the January 8, 1975 article, not only as it applied to *Scott* but also as it must apply to *Milkovich*, and found that as with Milkovich herein, there was no express statement that the Plaintiff, H. Donald Scott, committed perjury. Rather, as in the instant case, the clear impact in some nine sentences and a caption of the article is that the Plaintiff "lied at the hearing... having given his solemn oath to tell the truth." The court in *Scott* found that because of the actions of the Defendant Diadiun, this language or statement was verifiable. *Id.* at 251. Furthermore, the court in *Scott* analyzed what it termed the "larger objective" and "subjective context" of the statements in Defendant Diadiun's article and found that the words in the article, such as "Diadiun says...," represented "language of apparency" which placed the readers on

notice that what they were reading was the opinion of the writer. Lastly, the court noted that the placement of Diadiun's article on the sports page would lead a reader to believe that it was the opinion of the writer rather than a factual dissertation. The court held that any statements concerning "legal conclusions" in such a context, and in such a location, would probably be construed as the writer's opinion. *Scott*, 25 Ohio St. 3d at 253.

It is important to note that while *Scott* involved different parties, the article in question in *Scott* is the same article upon which the Plaintiff bases his claim in the instant case. Furthermore, in *Scott*, the Diadiun Article which is the subject of the case at bar was totally dissected and analyzed by the Court. The Ohio Supreme Court found all portions of that article to be constitutionally protected opinion. The conclusions reached by the Ohio Supreme Court in *Scott* apply equally to the Plaintiff, Michael Milkovich, Sr., in the instant case. There is no statement in the Diadiun article which specifically states that Michael Milkovich, Sr. committed perjury. Rather, the clear impact in some nine sentences and a caption is that the Plaintiff, Michael Milkovich, Sr., "lied at the hearing after... having given his solemn oath to tell the truth." Also, to the extent that the statements were verifiable as they pertain to H. Donald Scott, they are also verifiable as they pertain to Michael Milkovich, Sr. The article contains the same cautionary terms with respect to Plaintiff Michael Milkovich, Sr. as it does with respect to H. Donald Scott. Diadiun's article is prefaced with "T.D. says" and the second headline on the continuation of the article states "*Diadiun Says* Maple Told a Lie." Lastly, the location of the article as it pertained to H. Donald Scott also pertains to the Plaintiff, Michael Milkovich, Sr. — it was located on the sports page, "a traditional haven for conjolling[sic] invective and hyperbole." *Scott*, 25 Ohio St. 3d at 253. That location in and of itself would cause the reader not to assign the same weight to Diadiun's statements as if they had appeared on page one or in another portion of the paper reserved for "hard" news.

The Ohio Supreme Court clearly concluded in *Scott* that newspapers in Ohio have both a federal First Amendment opinion privilege and, pursuant to Article I, §§11 of the Ohio Constitution, a state

constitutional opinion privilege. As long as the author of the article does not use specific accusatory language, the statements are reasonably verifiable, objective cautionary terminology is used, and the statements or article is placed in the newpaper in a section usually reserved for editorial comment, the statements or article constitute privileged opinion. The court in *Scott* used the very article at issue in the instant case to develop and clarify the privilege of opinion as it pertains to the law of libel in the State of Ohio. In so doing, the Ohio Supreme Court has without question declared that the article written by the Defendant Diadiun on January 8, 1975 is privileged opinion as it pertains to the Plaintiff, Michael Milkovich, Sr. As such, Defendants are entitled to Summary Judgment.

V. THIS COURT HAS AUTHORITY TO APPLY THE RULE OF LAW PRONOUNCED BY THE SUPREME COURT IN *SCOTT v. THE NEWS-HERALD*, NOTWITHSTANDING THE SUPREME COURT'S PRIOR DECISION IN THIS CASE.

As discussed above, the constitutional privilege recognized by the Ohio Supreme Court in *Scott v. The News-Herald* would, if applied in the case at bar, clearly require the entry of summary judgment in favor of Defendants. In an attempt to circumvent that result, Plaintiff may argue that the Ohio Supreme Court's prior decision in this action represents the "law of the case" so as to preclude this Court's application of *Scott*. Because the Supreme Court's prior decision in this case was expressly overruled by *Scott*, however, the present case falls squarely within a well-recognized exception to the law of the case doctrine. The *Scott* decision is therefore controlling, as discussed in greater detail below.

The law of the case doctrine has been the subject of numerous decisions by the Ohio Supreme Court, the most recent of which is *Nolan v. Nolan*, 11 Ohio St. 3d 1 (1984). As explained by the court in *Nolan*, "the doctrine provides that the decision of a reviewing court in a case remains the law of that case in the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing

levels." 11 Ohio St. 3d at 3. Because its primary purpose is simply to preserve the relationship between superior and inferior courts under the Ohio Constitution, however, "the doctrine is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results." 11 Ohio St. 3d at 3.

Accordingly, the law of the case doctrine "is not ...recognized as an inexorable command," but rather is "directed to a court's good sense so as to relieve a court of rigid adherence" to prior decisions. *Petition of United States Steel Corp.*, 479 F.2d 489, 494 (6th Cir. 1973), *cert. denied*, 414 U.S. 859 (1973). As the Sixth Circuit Court of Appeals noted in *United States Steel Corp.*, there may be a "cogent reason" why a prior appellate ruling in a case is no longer applicable. In that court's words:

> Such reasons may include substantially different evidence raised on subsequent trial; *a subsequent contrary view of the law by the controlling authority; or a clearly erroneous decision which would work a manifest injustice.*

479 F.2d at 494 (emphasis added).

Although not applicable here, the first of these reasons was recognized as an exception to the law of the case doctrine in *Stemen v. Shibley*, 11 Ohio App. 3d 263 (1982), in which the Court of Appeals for Lucas County held that the doctrine does not apply "where the facts and issues are substantially different from those which were previously before the appellate court." 11 Ohio App. 2d at para. 2 of the Syllabus.

The second cited reason — applicable in the case of intervening Supreme Court decisions — was expressly recognized by the Ohio Supreme court in *Nolan v. Nolan*, the Syllabus of which reads as follows:

> *Absent extraordinary circumstances, such as an intervening decision by the Supreme Court*, an inferior court has no discretion to disregard the mandate of a superior court in prior appeal in the same case.

11 Ohio St. 3d at 1. Implicit in the *Nolan* Syllabus is a recognition that a lower court *does* have such discretion when the appellate mandate it would otherwise be obliged to follow has been rendered unsound by an intervening decision by a controlling authority.

The "intervening decision" exception[1] to the law of the case doctrine is particularly applicable here, inasmuch as the prior decision which would otherwise constitute a mandate to this Court has been expressly overruled by the *Scott* case. As the Supreme Court noted in *Peerless Electric Co. v. Bowers*, 164 Ohio St. 209, 210 (1955) (cited with approval in *State ex rel. Bosch v. Industrial Commission*, 1 Ohio St. 3d 94 (1982)), "a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and *the effect is not that the former was bad law, but that it never was the law.*" 164 Ohio St. at 210 (emphasis added). Further proceedings in this case, therefore, must necessarily be governed not by the discredited decision of the Supreme Court in *Milkovich*, but rather by the overriding authority of *Scott*.

Any other result would place insurmountable obstacles in the way of lawful and proper adjudication of this action. If the Supreme Court's *Milkovich* decision were to govern the trial of this case, for example, it would be necessary to instruct the jury in accordance with the *Milkovich* view of the law, and the jury would presumably be instructed to determine whether the Diadiun article, representing expressions of fact in view of the *Milkovich* court, was libelous. The giving of such an instruction would be plain and reversible error, however, in that the same article has been held in *Scott* to be constitutionally protected as a matter of law. It would thus be absurd to hold that further proceedings in this case must be governed by a view of the law that has not only been overruled, but is at odds with the prevailing

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[1] Also applicable to the present case is the third law of the case exception noted by the Sixth Circuit in *United States Steel Corporation* — that is, that the lower court need not follow "a clearly erroneous decision which would work a manifest injustice." That the Supreme Court's *Milkovich* decision was clearly erroneous was the express basis for the overruling of that decision in *Scott*. Moreover, to continue to construe the same article in a manner directly contrary to its treatment in *Scott* would indeed represent a manifest injustice.

interpretation of the Ohio Constitution. Such a result is clearly not required by the law of the case doctrine.

Accordingly, there is no legal or procedural impediment to this Court's application of the constitutional privilege recognized in *Scott*.

IV. CONCLUSION IV. CONCLUSION

For each and all of the reasons addressed above, summary judgment should be entered in favor of Defendants.

Respectfully submitted,

Richard D. Panza /s/

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Attorney for Defendants

PROOF OF SERVICE

This is to certify that a copy of the foregoing Memorandum of Defendants in Support of Motion for Summary Judgment has been sent by ordinary United States mail, postage prepaid, on this 16 day of January, 1987, to:

Brent L. English, Esq.
611 Park Building
140 Euclid Avenue
Cleveland, Ohio 44114

John G. Hurley, Esq.
66 Mentor Avenue
Painesville, Ohio 44077

Richard D. Panza /s/
Richard D. Panza

COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR., *Plaintiff,*	)	CASE NO. 75-CIV-0301
	)	JUDGE JACKSON
-vs-	)	AFFIDAVIT OF TED DIADIUN
THE NEWS-HERALD, *et al.* *Defendants.*	)	

STATE OF OHIO)
COUNTY OF LAKE) SS:

1. Ted Diadiun, having first duly sworn, deposes and says that he is a Defendant in the above-reference lawsuit, and that, to the best of his knowledge, in May, 1983 a middle school in the Maple Heights School District was named "Milkovich Middle School" after the distinguished wrestling coach, Michael Milkovich, Sr., Plaintiff herein; and

2. The Milkovich Middle School is located at 5460 West Boulevard, Maple Heights, Ohio 44134.

Further affiant sayeth naught.

Ted Diadiun /s/
Ted Diadiun

Sworn to and subscribed to in my presence this 18 day of December, 1986.

James K. Collins Jr. /s/
Notary Public

James K. Collins, Jr. Notary Public
State of Ohio — (Lake County)
My Commission Expires March 17, 1991

Plaintiff's Response to
Defendants' Motion for Summary Judgment
[Included in Joint Appendix at Request of Defendants]

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR., *Plaintiff,*	)	CASE NO. 75 CIV 0301
	)	JUDGE JACKSON
-vs-	)	**MEMORANDUM IN OPPOSITION TO SUMMARY JUDGMENT**
THE NEWS-HERALD, *et al.* *Defendants.*	)	

INTRODUCTION

Theodore Diadiun and the Lorain Journal Company, publisher of the *News Herald*, defendants herein, have for the third time moved for a summary judgment in this case. The present motion was filed despite the specific mandate of the Ohio Supreme Court (which the U.S. Supreme Court declined to review, ___ U.S. ___, 106 S.Ct. 322 (1095)), that this case be remanded to the Court of Common Pleas of Lake County Ohio "...for further proceedings consistent with this opinion." *Milkovich v. News-Herald*, 15 Ohio St. 3d 293, 299 (1984). In *Milkovich*, decided December 31, 1984, the Ohio Supreme Court reversed this court's determination that Mike Milkovich was both a public figure and a public offical for purposes of the law of defamation and that the article which is the subject of this defamation case was merely an expression of "heartfelt opinion."

In the intervening period, the Ohio Supreme Court has decided *H. Don Scott v. The News Herald*, 25 Ohio St. 3d 243 (1986) which raised some of the same issues. The decisions, each 4-3, are quite different in result and analysis.

The moving Defendants assert that the *Scott* decision overrules *Milkovich* and therefore this Court must grant a summary judgment in its favor. Plaintiff disputes this contention as follows.

ARGUMENT
I.

MICHAEL MILKOVICH IS NOT A PUBLIC FIGURE OR PUBLIC OFFICIAL FOR PURPOSES OF THE LAW OF DEFAMATION.

The Ohio Supreme Court has made it abundantly clear that Michael Milkovich is *not* a public figure or a public official for defamation purposes. Citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and its progeny, *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) and *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157 (1979), the Court, on December 31, 1984, found Mr. Milkovich "to be a private individual in the realm of First Amendment analysis.:" 15 Ohio St. 3d at 298. The Court correctly reasoned that

> [w]hile [Mr. Milkovich] may be an individual recognized and admired in his community for his coaching achievements, he does not occupy a position of persuasive power and influence by virtue of those achievements. By the same token, [Mr. Milkovich's] position in his community does not put him at the forefront of public controversies where he would attempt to exert influence over the resolution of those controversies.

Id. at 297. The Court went on to conclude that Mr. Milkovich did not "assume[] the risks of public life through advertisement of his wrestling clinics" and specifically rejected the notion that widespread advertisement for purely business purposes "could result in the classification of an individual as a public figure." *Ibid.*

The Ohio Supreme Court also rejected the notion that Michael Milkovich was a "public official" as the term has been defined for defamation purposes:

> Our interpretation of *Rosenblatt* leads us to conclude that the facts of the instant case are insufficient to qualify appellant as a public official for the purposes of defamation law. While appellees place great reliance on the case of *Johnston v. Corinthian Television Corp.* (Okla. 1978), 583 P. 2d 1101, where a grade school wrestling coach was held to be a public official, we find that a similar interpretation by this court would unduly exaggerate the "public official" designation beyond its original intendment. In any event, we are unpersuaded that the *Rosenblatt* definition of a public official was intended to encompass a person like appellant under the facts and circumstances contained in the instant case.

Id. at 297.

Despite the tortured history of this case and the unequivocal mandate of the Ohio Supreme Court remanding "the cause to the trial court for further proceedings consistent with this opinion," 15 Ohio St 3d 299, Defendants urge this Court to flatly ignore the Ohio Supreme Court and to essentially reverse its holding. There is no reason for this Court to do any such thing.

The purported rationale for Defendant's position is the Ohio Supreme Court's later decision in *H. Don Scott v. The News Herald*, 25 Ohio St. 3d 243 (1986). In *Scott*, the plaintiff was the superintendent of a public school system with statutory duties including being the "executive officer for the [school] board." R.C. §§3319.01. The Ohio Supreme Court, applying *Rosenblatt v. Baer*, 383 U.S. 75 (1966), determined that the "Maple Heights public has a substantial interest in the qualifications and performance of the person appointed as it superintendent." 25 Ohio St. 3d at 246.

While in *dicta* the majority of the Court, 4-3, said that it "overrule[d] *Milkovich* in its restrictive view of public officials," it holding was merely that "a public school superintendent is a public official for purposes of defamation law." *Id.* at 248.

The questions thus presented are whether this Court *may*, or *should*, reconsider the unequivocal determination by the Ohio Supreme Court that Mike Milkovich was neither a public figure or a public official for purposes of the law of defamation in this case.

The answer to both questions should be no. First, the holding in *Milkovich* is unquestionably the law of this case, irrespective of *Scott* or any other case. The Defendants recognize that the law of the case doctrine operates to make "...the decision of a reviewing court in a case...the law of that case in the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." Brief at 16, *quoting Nolan v. Nolan*, 11 Ohio St. 2d 1, 3 (1984).

The "rule is necessary to ensure consistency of results in a case, to avoid endless litigation by setting the issues, and to preserve the structure of superior and inferior courts as designed by the Consitution." *Nolan v. Nolan*, 11 Ohio St. 3d at 3; *State ex rel. Potain v. Mathews*, 59 Ohio St. 2d 29, 32 (1979). Accordingly, the "doctrine functions to compel trial courts to follow the mandates of reviewing courts", *Nolan, supra* at 3, and a trial court has no authority to extend or vary the mandate given. *Nolan, supra* at 4; *Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 304, 306 (1948).

The mandate in *Milkovich* is unequovical and unambiguous: It instructs the trial court to conduct "...further proceedings consistent with this opinion." 15 Ohio St. 3d at 299. Accordingly, this Court is bound by that opinion and the principles enunciated therein and it has no authority to vary those principles based on *Scott* or any other case.

Defendants in this case argue that there are exceptions to the law of the case doctrine and that one applies here — *viz.* the Ohio Supreme Court, *sub silentio*, overruled *Milkovich* when it decided *Scott*. This is *not* the case. *Scott* concerned, as was pointed out above, a very different set of facts with reference to public official status. The Supreme Court did not hold that a public school teacher, or a high school wrestling coach, was, *per se*, a public official. The majority did cite "several concerns relevant to our present discussion" including the role of a public school teacher in society, but it did not have before it a public school teacher or an athletic coach and it did *not* hold that either were, *per se*, public officials.

Scott stands merely for the proposition that a school superintendent who was defamed in relation to his "official responsibilities" was a public official and that a "restrictive view" of the definition of public officials that the majority read into *Milkovich* was not the law. 25 Ohio St. 3d at 248.

It is, therefore, quite clear that Mike Milkovich's First Amendment status remains as a "private individual" for purposes of this case. If that status is reviewed, it must be done by the Ohio Supreme Court with a full record before it. This Court, consistent with the salutary law of the case doctrine, must adhere to the Ohio Supreme Court's holding in *Milkovich* and apply "private figure" status to Mr. Milkovich.

II.

THE DEFAMATORY FALSEHOODS WRITTEN BY MR. DIADIUN AND PUBLISHED BY HIM AND THE LORAIN JOURNAL CO. IN THE NEWS HERALD ARE NOT CONSTITUTIONALLY PROTECTED OPINIONS.

The second issue raised by the Defendants in their renewed motion for summary judgment concerns the question of privilege. In *Milkovich, supra*, the Ohio Supreme Court concluded, as applied to the Plaintiff at bar, that the defamatory falsehoods written by Mr. Diadiun and published by the News Herald were actionable as assertions of fact and not protected, qualifiedly or absolutely, by a First Amendment-based "privilege." In *Scott, supra*, a majority of the Supreme Court concluded, as applied to H. Don Scott, that defamatory falsehoods written and published by the Defendants were absolutely privileged by the First Amendment as mere "expressions of opinion."

The Court in *Scott* characterized the *Milkovich* decision as a "subjective judgment call" and attempted to objectify its analysis by creating an elusive "totality of the circumstances test." 25 Ohio St. 3d at 250:

> After careful consideration of the various standards used to distinguish opinion from fact, it is our holding that a totality of the circumstances test be adopted. This test, however, can only be used as a compass to show general direction and not map to set rigid boundaries.

Ibid.

Applying these so-called "objective" factors, the Ohio Supreme Court concluded that (1) the language used by the Defendants was definitely actionable when read as a reasonable person would read it, (2) that the assertions were verifiable, (3) that the "objective and subjective" context of the article were not such that an "average reader" would understand the statements written "as an impartial reporting of perjury", and (4) that the "broader context" of the defamatory remarks, *ie.* the sports page — "a traditional haven for cajoling, invective, and hyperbole" — leads to the conclusion that

"'legal conclusions'" expressed in such a context would probably be construed at the writer's opinion." *Id.* at 254. Without further analysis, the Ohio Supreme Court apparently discounted or forgot about the first two factors and concluded, solely on the basis of the obviously subjective ones (*ie.* "the objective and subjective context" and the "broader context"), that the article was constitutionally protected opinion.

There are a number of questions created by the *Scott* holding. First, is this Court required to follow it? Second, may this Court follow it? Third, is the determination as to whether the article is constitutionally protected one of law or is it a mixed question of law and fact for the jury? Fourth, what harm would result if this Court followed the mandate in *Milkovich* rather than the decision in *Scott*? These questions are answered in order below.

1. The law of the case doctrine is squarely involved in resolving the first question. The decided policy is in favor of following the Supreme Court's mandate in *Milkovich* and *Nolan v. Nolan*, 11 Ohio St. 3d 1 (1984). The rationale for doing so has especial force in this case. This case is now twelve years old, having been to the Ohio Supreme Court twice. That Court mandated that it be tried consistent with its opinion reported at 15 Ohio St. 3d 292 (1984) and this is exactly what should be done.

There is no doubt that it is within this Court's sound discretion to disregard the result in *Scott* given the law of the case doctrine as it exists, the almost pathetic and clearly results-oriented decision in *Scott* (to which there were three biting dissents) and the constantly changing law in this subject area. Sooner or later, the United States Supreme Court will confront the difficult issues presented in making the opinion — fact distinction and give trial courts appropriate guidance. As it now stands, there are two disparate decisions from the Ohio Supreme Court within two years on the same article. Surely justice compels the conclusion that in the sound exercise of its discretion, this Court may follow the mandate in *Milkovich* and leave it to the Ohio Supreme Court to address the complex issues presented, should a jury ultimately vindicate Mr. Milkovich's reputational rights.

2. This Court certainly could follow the result in *Scott* although there is in reality very little reason to do so. Were this case presented *after* the Milkovich-Scott line of cases, then this Court would be obliged to follow *Scott*, if the facts warranted it. However, the history of this proceeding should not be ignored. The Ohio Supreme Court mandated that proceedings be had *consistent* with its holding in *Milkovich*. The *Scott* decision has no precedential value as to this, except that it reveals that on that day, given the record, the justices of the Ohio Supreme court, subjectively analyzing an article, concluded that its location in the paper and the fact that it did not contain expressly an assertion that Mr. Scott committed the crime of perjury was sufficient to cloak these defendants with pernicious immunity from having to legally account for their misconduct.

2. The Ohio Supreme Court in *Scott* concluded, in lock-step fashion, that the question of whether a particular article was enshrouded with a constitutional privilege or was actionable was a question for the Court as a matter of law. 25 Ohio St. 3d at 250. In many instances, especially when applying *objective* criteria (such as the first two in the "totality of the circumstances" from *Scott*), this can be done as a matter of law. However, where, as here, the question can be less clear (given the application of other factors like "the objective and subjective context" or the "broader context"), the question becomes a mixed question of law and fact. There is no sound reason under these circumstances why a jury could and should not, with an appropriate instruction, make such a determination. *See*, for example, *Good Government Group v. Superior Court*, 22 Cal. 3d 672, 682 (1978), *cert. denied sub. nom.*, *Good Government Group v. Hogard*, 441 U.S. 961 (1979).

There are other strong reasons why a jury should make this decision. First, a jury demand was made in the this case. Further, this case is before the Court, pursuant to Ohio R. Civ. Proc. 56(c), on Defendants' third summary judgment motion. It is, of course, hornbook Ohio law that all inferences are to be construed against the moving party and in favor of the non-moving party. Summary judgment may only be granted where there are no genuine issues of fact in dispute *and* the moving party is entitled to judgment "as a matter of

law." *Campbell v. Hospitality Motor Inns, Inc.*, 24 Ohio St. 3d 54, 58 (1986).

Although there are a number of decisions holding that the constitutional privilege question is for the Court to decide "as a matter of law," these decisions should not be read simply so as to conclude that the Court may *and must* deprive a jury of the opportunity to make that decision where it cannot properly be made as a matter of law. Cf. *Good Government Group v. Superior Court, supra*.

Simply put, a jury in a case such as this should decide, where the facts presented on summary judgment cannot be analyzed to a reasonable certainty that a statement is an assertion of fact or an opinion, whether it is one or the other. If it decides that the statement, because of the totality of the circumstances, was just an "opinion," then judgment must be entered for the Defendants. If it decides otherwise, then the jury could return a verdict for the Plaintiff provided that the evidence supports, more probably than not, a finding of falsity, defamation, and damages according to the standard of fault adopted in *Embers Supper Club v. Scripps Howard*, 3 Ohio St. 3d 22 (1984) consistent with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

4. Practically speaking, there would be no harm to Defendants if this Court were to follow the mandate in *Milkovich* and proceed to trial. The jury would and should be instructed that Mr. Milkovich needed to show negligence on the part of Mr. Diadiun and the newspaper, that the article was false and defamatory, and that Mr. Milkovich sustained reputational injury. He should be entitled to an instruction on punitive damages if there was clear and convincing evidence of actual malice, something that Plaintiff can do in this case. If Defendants prevail, the case is finally over. If not, then they have their appellate remedies and can certainly argue that this Court should have applied the *Scott* formulation as a matter of law and deprived Mr. Milkovich of his hard fought right to vindicate his reputation injury. At the least, the trial phase of the case can be complete and there will be little likelihood of a third remand, two years from now, to try the case on the terms herein suggested.

There is hardly justification for the shibboleth of the alleged "chilling effect" on the *News Herald* from this defamation case. If this

case had a chilling effect, it has long since occurred. Further, if Mr. Diadiun and his newspaper were going to learn a lesson, there has been ample time to do it. The only victim whose rights have not been determined on the merits is Mike Milkovich. Surely he is entitled to that now, notwithstanding *Scott*.

Accordingly, Mike Milkovich urges this Honorable Court to have the courage to abide by the proper result in *Milkovich*, give him his day in Court and his opportunity to have a jury determine his rights by a fair and just standard. While other alternatives are available to the Court, only this one would do justice. It is counsel's firm belief that ultimately such a decision would be vindicated and he is prepared to litigate this case to that end.

Respectfully submitted,

Brent L. English /s/

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Memorandum in Opposition to Motion for Summary Judgment was mailed by regular U.S. Mail, postage prepaid, this 14th day of July, 1987 to Richard D. Panza, Esq., Wickens, Herzer & Panza Co., L.P.A., 1144 West Erie Avenue, Lorain, Ohio 44052-1496 and to John G. Hurley, Esq., 66 Mentor Avenue, Painesville, Ohio 44077.

Brent L. English /s/

BRENT L. ENGLISH
Attorney for Plaintiff

Defendants' Supplemental Memorandum in Support of Summary Judgment

[Included in Joint Appendix at Request of Defendants]

COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MICHAEL MILKOVICH, SR., *Plaintiff.*	)	CASE NO. 75-CIV-0301
	)	JUDGE JACKSON
-vs-	)	**REPLY MEMORANDUM OF DEFENDANTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**
THE NEWS-HERALD, *et al.* *Defendants.*	)	

On November 12, 1986, Defendants moved for summary judgment in the captioned action on the ground that the Plaintiff, Michael Milkovich, Sr., is a "public official" for purposes of this proceeding and cannot establish that the newspaper article in question was published with actual malice, and on the further ground that the article in question was constitutionally protected opinion. Defendants' motion is premised upon the Ohio Supreme Court's decision in *Scott v. The News Herald*, 25 Ohio St. 3d 243 (1986), which overruled the Supreme Court's prior decision in this case, *Milkovich v. The News Herald*, 15 Ohio St. 3d 292 (1984), on both of the above issues.

On July 14, 1987, Plaintiff served his Memorandum In Opposition to Summary Judgment (hereinafter referred to as "Plaintiff's Memorandum"). This Reply Memorandum is submitted in response thereto, and in support of the pending motion for summary judgment.

I. THE LAW OF THE CASE DOCTRINE

Underlying all of the arguments in Plaintiff's Memorandum is the doctrine of the law of the case, discussed at length in Defendants' principal memorandum in support. *See* Memorandum of Defendants in Support of Motion for Summary Judgment ("Memorandum in Support") at 16-19. Although Plaintiff would obviously prefer the law of the case doctrine to apply, Plaintiff's Memorandum does not seriously dispute the proposition that the doctrine is subject to well-recognized exceptions. Indeed, in the *Nolan* case, quoted at length by Plaintiff with respect to the basic definition of the doctrine and its

underlying reasons, the Ohio Supreme Court itself recognized that the doctrine does not apply in "extraordinary circumstances, such as an intervening decision by the Supreme Court." *Nolan v. Nolan*, 11 Ohio St. 3d 1 (1984). *See also Petition of United States Steel Corp.*, 479 F.2d 489, 494 (6th Cir. 1973), *cert. denied*, 414 U.S. 859 (1973) (mandate need not be followed on remand when there has been "a subsequent contrary view of the law by controlling authority").

That is Court is *not* bound by the "mandate" of the Supreme Court's *Milkovich* decision is in fact conceded by Plaintiff in his acknowledgement that "[t]his Court certainly could follow the result in *Scott*." Plaintiff's Memorandum at 9. Because he cannot seriously challenge the proposition that the *Milkovich* mandate would yield, at least in principle, to an intervening decision overruling it, Plaintiff has instead advanced a variety of arguments suggesting that the "intervening decision" exception to the law of the case doctrine should not apply here. As discussed below, each of these arguments is without merit.

II. THE PUBLIC OFFICIAL ISSUE.

With respect to the public official issue, Plaintiff first argues that the "intervening decision" exception is not applicable because, in Plaintiff's view, *Scott* did not overrule *Milkovich*. The absurdity of such an argument is evident from Plaintiff's own Memorandum, in which he quotes the *Scott* Court's own statement that "we overrule *Milkovich* in its restrictive view of public officials." 25 Ohio St. 3d at 248.

Plaintiff next characterizes the *Scott* Court's public official holdings as involving nothing more than a factual determination on the public official status of school superintendents, a determination that, in Plaintiff's view, has no application to teachers and coaches. Contrary to the implication in Plaintiff's Memorandum, however, the *Scott* decision not only determined the status of school superintendents as public officials, it also fundamentally changed the legal standard by which that determination would have been made under *Milkovich*,

overruling *Milkovich* on that very issue. Plaintiff concedes this when he states that " *Scott* stands ... for the proposition ... that a 'restrictive view' of the definition of public officials that the majority read into *Milkovich* was not the law." Plaintiff's Memorandum at 6. *See* 25 Ohio St. 3d at 248. Plaintiff's words echo the Ohio Supreme Court's holding in *Peerless Elec. Co. v. Bowers* that when the Supreme Court overrules a former decision "the effect is not that the former was bad law, but that it was never the law." 164 Ohio St. 209, 210 (1955) (cited with approval in *State ex rel. Bosch v. Industrial Commission*, 1 Ohio St. 3d 94 (1983)).

When the legal standard adopted in *Scott* is applied to the facts of this case, the result can only be that Plaintiff is a public official, as discussed at length in Defendants' principal Memorandum in Support. *See* Memorandum in Support at 6-10. If this Court were to follow the "law of this case" under *Milkovich*, it would act in contravention of the law of this state as set forth in no uncertain terms in *Scott*. Nothing in the law of the case doctrine compels the Court to do so, and indeed the principle of *stare decisis* commands the opposite course.

III. THE CONSTITUTIONAL PRIVILEGE ISSUE.

On the issue of constitutional opinion privilege, Plaintiff again invokes the law of the case in one breath, but disavows that doctrine in the next. Plaintiff first imples that under the law of the case doctrine that Court is obliged to follow *Milkovich*. Plaintiff's Memorandum at 8. In the very next paragraph, however, Plaintiff argues that whether or not to apply *Scott* lies within the "sound discretion" of this Court. It is at best a novel argument that this Court has "discretion" to depart from the binding authority of the Ohio Supreme Court's most recent pronouncement of the law. Plaintiff himself concedes the correct view in his very next paragraph, stating that "[w]ere this a case presented after the *Milkovich-Scott* line of cases," which it is, "then this Court would be obliged to follow *Scott*." Plaintiff's Memorandum at 9.

The rest of Plaintiff's argument on the constitutional privilege issue is founded upon nothing more than his disagreement with *Scott*,

a decision he describes as "almost pathetic and clearly results-oriented." In his zeal to avoid *Scott*, Plaintiff goes to great lengths to characterize the constitutional privilege issue as one of fact for the jury. As Plaintiff concedes, however, "[t]he Ohio Supreme Court in *Scott* concluded ... that the question of whether a particular article was enshrouded with a constitutional privilege ... was a question for the Court as a matter of law." Plaintiff's Memorandum at 10. *See* 25 Ohio St. 3d at 250.

As with the public official issue, the Supreme Court in *Scott* drastically changed the legal standard that would have governed the constitutional privilege issue under *Milkovich*. With respect to the privilege issue, however, the application of that standard to the facts of *this* case has not been left for this Court to decide. Rather, the Supreme Court itself has already decided that the particular article involved in this case is constitutionally protected opinion as a matter of law.

Plaintiff would have this Court disregard the clear import of the *Scott* decision in favor of submitting the issue to a jury, suggesting that there would then be "little likelihood of a third remand." Plaintiff's Memorandum at 12. In reality, however, the approach suggested by Plaintiff would defeat, rather than serve, the interests of judicial economy. Were this Court to conduct a trial under the *Milkovich* "mandate" and instruct the jury in accordance with that decision, Defendants would appeal on the basis, among other arguments, that the instructions to the jury were erroneous in light of the legal standards held in *Scott* to be the law of Ohio. Plaintiff's approach would thus expend the valuable resources of the Court and the parties in a costly trial, when the legal issue ultimately determinative of the outcome can be expeditiously resolved now.

Accordingly, Defendants submit that this Court is not only permitted to follow the *Scott* decision on the issue of constitutional opinion privilege, but is obliged to do so.

IV. CONCLUSION.

For the reasons addressed above and in Defendants' principal Memorandum in Support, summary judgment should be granted in favor of Defendants and against Plaintiff on all issues.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that a copy of the foregoing Memorandum of Defenants in Support of Motion for Summary Judgment has been sent by ordinary United States mail, postage prepaid, on this 7 day of August, 1987, to:

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Richard D. Panza /s/
Richard D. Panza